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Bennett, Edmund H

Fire insurance cases.

Call Number	KF 1196 A513	Vol. 4	Copy
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Fire insurance cases.

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FIRE INSURANCE CASES:

BEING

**A COLLECTION OF ALL THE REPORTED CASES
ON FIRE INSURANCE, IN ENGLAND, IRELAND,
SCOTLAND, AND AMERICA,**

FROM

THE EARLIEST PERIOD TO THE PRESENT TIME,

CHRONOLOGICALLY ARRANGED.

VOL. IV.

COVERING THE PERIOD 1855-1864.

WITH NOTES AND REFERENCES.

BY

EDMUND H. BENNETT.

NEW YORK:
PUBLISHED BY HURD AND HOUGHTON.
Cambridge: The Riverside Press.
1876.

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NOV 16 1971

PREFACE TO VOLUME FOURTH.

THE Insurance Cases decided during the period covered by **this volume** are so numerous, it was found impossible to insert **them all in full**; and as many involved only points that had **been often** previously decided, they were deemed relatively **unimportant**. In such cases a head note, or syllabus merely of the case has been published here.

EDMUND H. BENNETT.

Boston, *December 1, 1875.*

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FIRE INSURANCE CASES.

BOWDITCH MUTUAL FIRE INSURANCE CO. *vs.* ISAAC WINS-
LOW *et al.*¹

(Supreme Court, Massachusetts, March Term, 1855.)

Bill of Review. — Non-disclosure. — Mortgage. — Knowledge of Agent. — Assignment.

The application in this case stated that it contained a full, just, and true exposition of the condition, value, and risk of the property to be insured, so far as material, and that the applicant held himself bound by the company's by-laws. The policy was also made subject to the by-laws ; and these provided that the policy should be void unless the true title of the insured should be expressed in the application, and that the applicant should be liable for the representations of any agent through whom the application was made. *Held*, that the policy was avoided by the omission to state the existence of a mortgage, though the fact was not material to the risk, and though the company's agent had knowledge of it ; and this omission is ground for a bill of review.

It seems that an assignment of a policy issued by a mutual fire insurance company, made with the assent of the company, to a mortgagee of the property insured, does not make the assignee, until he has given a new deposit note, "the insured," within the meaning of a by-law of the company, suspending the risk on the policy in case of neglect of the insured to pay an assessment when duly demanded.

In this case a writ of review having been granted to set aside a judgment of this court, by reason of the fact that the defendants, after filing exceptions to the ruling of the court below, had by mistake omitted to enter the same in this court ; the case was found to have been an action on a mutual fire policy, to which several objections were taken. Those noticed by the court were the following : 1. That the policy was ineffectual by reason of the false answers of the assured in his application. The 16th question propounded to him was, "State whether or not incumbered, to whom, and to what amount?" The answer was, "Mortgaged for \$2,000, on the buildings, land, &c., value \$7,000." It was proved that in addition to the mortgage for \$2,000, there was another and older mortgage to the Traders' Bank, in full

¹ 3 Gray, 415. Case condensed. *S. C. post*, p. 167.

force, under which an entry to foreclose had been made before the fire. This was held a good defence to a suit upon the policy; "because," said the court, "it was a misrepresentation as to the lien the insurance company would have upon the property for the security of the deposit note." See also where the same court have gone further and held, irrespective of this, that the company have the right to be truly informed as to the extent of the interest of the assured in the premises. *Davenport v. New England Mut. Ins. Co.*, ante, vol. 3, p. 129; *Hayward v. New England Mut. Ins. Co.* Ib. p. 439; *Brown v. People's Mut. Ins. Co.* Ib. 583.

It was objected that the applicant did not come within this rule, since in his proposal he only "covenants and agrees that the foregoing is a just, full, and true exposition of all the facts," "so far as the same are known to the applicant, and are material to the risk." It was urged that the omission to mention the mortgage to the Traders' Bank was not material, and that the jury had so found. But the court answered that this was not a full statement of the obligations of the applicant. "In the application itself," say they, "he says he 'holds himself bound by the by-laws of said company.' Again, the policy is in terms subject to the by-laws of the corporation. Article 19 of those by-laws is thus: 'The applicant for insurance shall make a true representation of the property in which he requests insurance, and so far as concerns the risk and value thereof, and of his title and interest therein; and in case the application is made through an agent, the applicant shall be held liable for the representation of such agent.'" The court accordingly held, under this provision, that the omission was fatal. 2. Another ground of defence was an alleged violation of the 9th by-law, which was in these words: "If the assured shall neglect for the space of ten days, when personally called upon, or after notice in writing left at his last and usual place of abode or business, to pay any assessment, the risk of the company on the policy shall be suspended till the same is paid." Held, that a failure to comply with this by-law would be a good defence to the insurers. 3. The plaintiffs were assignees of the policy, one Morrill being the original assured. The court said that it would seem that notice of the assessment, though after the assignment, was properly given to Morrill. See *Foster v. Equitable Mut. Ins. Co.*, ante, vol. 3, p. 741.

Notice of Loss. — Waiver.

NOONAN, respondent, *vs.* HARTFORD FIRE INSURANCE CO., appellants.¹ (Supreme Court, Missouri, March, 1855.) *Certificate of Loss. — Waiver.*

A condition in a fire policy that the assured shall, after a loss, procure the certificate of the nearest magistrate or notary as to its fairness, is a condition precedent to a recovery, and must be strictly complied with, unless there is a waiver.

The fact that the company, after receiving a certificate which is not in compliance with the terms of the policy, enters upon an investigation as to the extent of the loss, without immediately objecting to the certificate, and offers to pay a certain amount, is not a waiver of strict compliance with the condition, when their proposition is declined. See *Lampkin v. Western Assur. Co.*, *post*; *Sexton v. Montgomery Ins. Co.*, *ante*, vol. 3, p. 80; *Taylor v. Merchants' Ins. Co.* Ib. 94; *O'Neil v. Buffalo Ins. Co.* Ib. 103; *Westlake v. St. Lawrence Ins. Co.* Ib. 404; *Protection Ins. Co. v. Pherson*, Ib. 753; *Edge v. Duke*, 3 Bigelow, 67 and note, 70.

HUTCHINSON, respondent, *vs.* WESTERN INSURANCE CO., appellants.² (Supreme Court, Missouri, March, 1855.) *Notice of other Insurance.*

A condition annexed to a policy of insurance that the assured shall cause any previous or subsequent insurance to be indorsed on his policy is a condition precedent, and is not satisfied by verbal notice to the insurer of such other insurance.

Overruled in *Hayward v. National Insurance Co.*, *post*, vol. 5.

LAMPKIN *vs.* ONTARIO MARINE AND FIRE INSURANCE CO.³ (Queen's Bench, Upper Canada, Hilary Term, 1855.) *Notice of Loss. — Waiver.*

The declaration alleged that notice of the loss was given to the defendants forthwith, and an account of the particulars of the loss as soon as possible (such being the requirements of the policy). Issues were taken on these allegations. There were two separate policies, on a shop and on the goods contained in it. Both building and goods were destroyed. It appeared that the fire took place on the 13th of June, and the notices, both as to the shop and the goods, were given on the 13th of July. The defendants then entered into correspondence with the plaintiffs as to furnishing better particulars, which were afterwards furnished; and they then refused to pay for the goods on account of some suspicious circumstances attending the fire, but they paid the amount insured on the house. *Held*, that under these circumstances the defendants were precluded from objecting to the sufficiency of the notices or to the time at which they were given.

WESTERN *vs.* GENESEE MUTUAL INSURANCE CO.⁴ (Court of Appeals, New York, March, 1855.) *Insurance of Foreign Property. — Lex loci.*

A mutual company, incorporated by the laws of New York, and there located, which is authorized to insure the property of all persons who become members of the company,

¹ 21 Mo. 81.

² 21 Mo. 97.

³ 12 Up. Can. Q. B. 578.

⁴ 12 N. Y. 258.

Camphene.

may make within New York contracts with residents of Canada, insuring them against loss to property located there.

Where the application for insurance is signed in Canada by persons residing there, and transmitted to a company at its place of business in this state, and it contains a provision that, if approved by the company, the policy shall bear the same date as the application and take effect from that time, and the application is approved, and the policy signed by the company at its place of business, and sent to the mutual agents of the parties in Canada, to be delivered to the applicants, and it is there delivered to them, the contract will be governed by the laws of New York. See *Hyde v. Goodnow, ante*, vol. 3, p. 128.

WESTFALL vs. HUDSON RIVER FIRE INSURANCE CO.¹

(Court of Appeals, New York, March, 1855.)

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A policy declared that the carrying on of any of the occupations mentioned in the hazardous, extra hazardous, or special rate classes in the building, or using it for storing or keeping any of the articles enumerated in these classes, should suspend the operation of the policy for the time, unless such use of the premises should be specially provided for therein, or should be afterwards agreed to in writing, to be added to or indorsed on the policy. This language, in connection with the statement annexed to the enumeration of the hazardous and extra hazardous occupations and articles, to the effect that a specified additional premium would be required where these more dangerous trades are carried on and such combustible articles are kept, shows that it was not intended to exclude such employment and property from the privilege of being insured, but only that the insured parties, in respect to them, should pay such additional premium as was deemed adequate to the increased risk; and that the corporation should not be deemed to have assented to take that class of risks without an express provision to that effect. DENIO, J.

There being no such express provision, *held*, that the use of camphene for lighting purposes (camphene being one of the articles referred to in the above mentioned clauses) avoided the contract.

THE case stated in the opinion.

G. W. Stevens, for the appellant.

N. Hill, Jr., for the respondent.

DENIO, J. I am of opinion that by the true construction of the provisions of this policy, the use of camphene as a light in stores or warehouses, where such buildings or personal property contained in such buildings are insured, is prohibited. The policy declares that the carrying on of any of the occupations mentioned in the hazardous, extra hazardous, or special rate classes, in the building, or using it for storing, or keeping any of the articles enumerated in these classes, shall suspend the operation of the policy for the time, unless such use of the premises shall be specially provided for in the policy, or shall be afterwards agreed to by the company in writing, to be added to or indorsed on the policy. This language, and still more clearly

¹ 12 N. Y. 289.

Camphene.

the statement annexed to the enumeration of the hazardous and extra hazardous occupations and articles, to the effect that a specified additional premium will be required where these more dangerous trades are carried on and such combustible articles are kept, shows that it was not intended to exclude such employments and property from the privilege of being insured, but only that the insured parties, in respect to them, should pay such additional premium as was deemed adequate to the increased risk; and that the corporation should not be deemed to have assented to take that class of risks, without an express provision to that effect in the contract, or annexed to or indorsed upon it. The theory of the contract is, that without some special language, either in the description of the subject of insurance or otherwise, the policy will prohibit the trades and goods enumerated in the three classes from being kept in the building which is insured or which contains the insured goods; so that the injured party must not only pay the premium exacted for the risk which attaches to his property, but he must see that in the description of the property, or by some provision therein, or an indorsement thereon, or in some other way, the contract shall contain a recognition of his right to exercise the more hazardous occupation, or to keep the more combustible goods on his premises. The provision that the premises shall not be used to carry on the enumerated employments, or for the storage or keeping of the enumerated chattels without a special provision to that effect, is a warranty, the breach of which avoids the policy and prevents any claim for indemnity for a loss, though it appear that the fire arose from some other cause quite unconnected with the prohibited employment or article. *Mead v. The Northwestern Ins. Co.* 3 Seld. 530.¹

I have rehearsed these principles, not because they are unfamiliar, but in order to examine the provision directly under consideration in connection with them. Following immediately after the enumeration in the special memorandum is the clause: "Saltpetre, gunpowder, and cotton are expressly prohibited from being deposited, stored, or kept in any building insured or containing any goods or merchandise insured by this policy, unless by special consent in writing on the policy." The effect of this is to add to the enumeration of articles which must be insured in

¹ *Ante*, vol. 3, p. 483.

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special terms — the three articles mentioned. Two of the articles were already enumerated, but for some reason, or without any, they are repeated in this connection. The terms of the clause, however, only suffice to put them in the same category with those before enumerated. Next follows the clause upon which this action depends: "Camphene, spirit, gas, or burning fluid, when used in stores or warehouses as a light, subjects the goods therein to an additional charge of 10 cents per \$100, and premium for such use must be indorsed in writing on the policy." The effect of the language, I think, is to attach the same consequences to the use of these articles in stores and warehouses, which is visited upon the exercise of the hazardous occupations, on the storage of the hazardous goods mentioned in the first classification of subjects which are to be specially insured. The practice is not absolutely prohibited, but it must be paid for; and, moreover, it must be specially recognized by an indorsement on the policy. It seems pretty obvious that inasmuch as the practice of using camphene for a light could not, upon the plan of the instrument, be inserted in the classes of risks, they being devoted to the enumeration of trades and occupations and of particular chattels, a special paragraph was framed to explain that the practice was prohibited under the ordinary policy, but the right to pursue it could be obtained by the payment of a certain premium, and having the evidence of the purchase indorsed on the policy. If this is a fair interpretation of the language, there can be no doubt but that the prohibition, like every other positive provision in a policy of insurance, is a warranty, which, if violated, precludes a recovery on the instrument. In *Mead v. The Northwestern Insurance Co.*, to which I have already referred, the policy seems to have been essentially like the one we are considering, except that the clause respecting camphene is thus: "Camphene cannot be used in the building where insurance is effected, unless by special permission in writing." It was held that the use of camphene for lighting avoided the policy. The provision is certainly more direct and perspicuous than the one before us, but I cannot doubt but that both mean precisely the same thing, and I think it would be a refinement to establish a distinction between them. The superior court was of opinion that camphene could not be used as a light under this policy, without subjecting the insured to the hazard of any loss which might

Landlord and Tenant. — Alterations by Tenant.

arise from it. If this is so, it is because the use of it is prohibited in a certain qualified manner. I do not see anything in the language of the instrument to warrant this construction. If prohibited at all, the usual consequences follow from its use, that is to say, that the insured will be precluded from recovery for any loss on account of violating a warranty.

If an article enumerated in the list of hazardous articles is stored or kept in the building, and there is a loss by fire, the insurers are not liable, though the fire had no connection with the hazardous property; but the insured may avoid such consequences by paying the extra premium and procuring a proper indorsement on the policy. The clause under consideration declares that the use of camphene as a light subjects the insured to a certain extra premium, and that an indorsement of the payment of the premium must be made on the policy. But it does not say, except by implication, that camphene may not be used without such payment or without an indorsement; but the implication is nearly as strong as though the language had been express and positive. I do not think we are at liberty to read it as though the use of the article was permitted.

The judgment of the superior court should be reversed and a new trial ordered.

All the judges concurred.

Judgment accordingly.

SETH PADEFORD vs. PROVIDENCE MUTUAL FIRE INSURANCE Co.¹ (Supreme Court Rhode Island, March, 1855.) *Landlord and Tenant. — Alterations by Tenant.*

Where P., having effected insurance upon his dwelling-house, rented it to A., who built an addition to it, in which addition a fire originated which destroyed the whole building, and P. thereupon brought his suit against the underwriters, who resisted on the ground that there had been a material alteration by the "act of the proprietors," within the intent of a certain section of their charter: *Held*, that that only is an act of the proprietor in the sense of the charter which the owner himself does, or authorizes to be done, or adopts as his before a loss accrues. *Held*, also, that it was properly left to the jury to determine, looking to all the circumstances, how far the owner had in fact authorized the alterations by the tenant.

Seem, that from the proximity of the owner's residence to the premises rented, the nature of the repairs and alterations made, and like circumstances, a jury is warranted in inferring his knowledge of and assent to the alterations.

¹ 3 R. I. 102.

GOIT vs. NATIONAL PROTECTION INSURANCE CO.¹

(Supreme Court, New York, April, 1855.)

Payment of Premium. — Waiver. — Acknowledgment of Receipt. — Cancellation of Policy. — Assignment after Loss.

The plaintiff's right to recover on a policy was opposed on the ground that the premium had not been paid as required. *Held*, that the payment might be waived by the company's agent, and that a receipt of the premium by such agent, though after loss, was such a waiver. *Held*, also, that the acknowledgment of receipt of payment was conclusive upon the insurers.

The insurers having the power to cancel the policy in question requested their agent to do so. The agent reported their desire to the assured, but did not cancel the policy; saying that he could get another, and that in the mean time the present policy would remain in force. *Held*, that it did remain in force.

The policy in question provided that any assignment before or after loss, without consent, should avoid the contract. *Held*, that the provision was void as opposed to public policy, when applied to assignments after loss.

ACTION upon a policy of insurance, the premium for which, though acknowledged to have been received when the policy issued, was not in fact paid until after loss. Whether this was because of the conduct of the agent is not clear.² Under a power reserved, the defendants had requested their agent to cancel the policy, as the risk was not considered a good one. The agent communicated the request to the assured, but instead of cancelling the policy said that he would get another, and that in the mean time the present would remain good. The policy contained a provision rendering it void in case of an assignment before or after the loss, unless consent were obtained. The policy was assigned to the plaintiff after the loss.

M. H. Throop, for the appellants.

O. Robinson, for the respondent.

W. F. ALLEN, J. The objections to the right of the plaintiff to recover are threefold. (1.) That the premium was not actually paid at the time of the loss of the premises by the peril insured against, and therefore the policy had not attached. (2.) That after the delivery of the policy, and before the loss, the defendants had signified to the insured their desire to cancel the policy, and that from that time the policy ceased to be valid. (3.) That by the transfer, by one of the insured to his co-tenant, of his interest in the claim, after the loss, the liability of the defendants was discharged.

¹ 25 Barb. 189² That is, from the original report.

The cause was tried before me out of court, for the convenience of the parties and their witnesses, and the better to enable them to present the legal questions upon which their rights depended; and the decisions of the propositions now brought under review were rather formal, and to put them in form for adjudication by the court in banc, than the expression of a deliberate opinion of my own. Upon a review of the questions, however, the impressions which I entertained in favor of the plaintiff have been strengthened and confirmed, and I am of the opinion that the objections are susceptible of a satisfactory answer.

To the first, I think several answers may be made. (1.) It is a well settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured. Broom's Legal Max. 547. It extends to all provisions, even constitutional and statutory, as well as conventional. The law will not compel a man to insist upon any benefit or advantage secured to him individually. Hence it was the privilege of the insurers in this case, if they elected so to do, to waive the condition making the actual payment of the premium a condition precedent to the binding efficacy of any insurance, as it was a provision inserted for their benefit, and in which they alone were interested. This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred; and it may be by the managers of the company or by a duly authorized agent; and as it was done by the latter in this case, it was obligatory upon the company. The agent was the general agent of the company to make contracts of insurance in a given form, and so long as he confined his acts to the matters of his agency, his principals were bound. Proof of this waiver did not tend to vary the terms of the contract. It was given to show a waiver of a condition precedent to the contract becoming valid as such. It was no more a violation of the rule prohibiting parol evidence to vary or contradict a written contract than would have been evidence by parol of the actual performance of the conditions.

(2.) The general rule that receipts, being mere admissions, are liable to contradiction and explanation by parol, may be universally true as applicable to mere receipts when they are disconnected with, or unnecessary to give validity to, contracts or agreements of any kind. When they make a part of a contract,

Payment of Premium. — Waiver. — Acknowledgment of Receipt, etc.

as in deeds and bills of lading, the same rule is applicable when the paper is used as a receipt or acknowledgment simply, to defeat an adverse claim, and not as upholding the contract. It is unnecessary to refer to any of the numerous cases in which this has been held. But it is quite another thing when it is sought to contradict a written receipt incorporated into the contract, for the purpose of defeating the contract itself. The writing, read as a whole, shows a valid contract, and in this case the receipt, in connection with the condition, shows that to this policy the condition has no application. There being no pretence of fraud on the part of the assured, it would be a fraud upon them to allow a witness now to contradict this acknowledgment for the purpose of bringing the contract within the provision referred to, and thus defeat the policy. The defendants should be estopped by their receipt from alleging that the policy was void because the acknowledgment was untrue.

For the purpose of supporting the contract, so long as the payment of the premium was, as is claimed, a condition precedent to the attaching of the policy, the receipt inserted in the contract should be considered a part of it. 1 Phil. on Ins. § 515. (3.) The parol evidence of waiver of this condition may be said to be competent to overcome the parol evidence of the defendant to defeat the contract.

The second objection is untenable, for the reason that the defendants never availed themselves of the condition authorizing them to cancel the policy. If they intended their agent to do so, it is sufficient to say that the agent did not comply with their directions. It was competent for the agent to determine the time at which he would comply with the wishes of the company, and indeed the very instructions seem to imply that he shall do so, and accommodate his action in the premises to the interest of the assured. But whatever may have been the instruction of the company, this policy never was cancelled.

The third objection is one of the first impression, so far as I am aware. Conditions against the assignment of policies have been in use, and have been sustained by courts. The contract of insurance is one eminently of personal confidence, and the character of the insured forms an important element among the inducements of the underwriters to assume the risk; and hence the provisions against assignments of the policy during the continu-

ance of the risk is highly beneficial to the insurer. It has been left for modern ingenuity to attempt the application of the same condition, and under the same penalty, to the assignment of any claim under the policy after the risk has ceased by the destruction, by the perils insured against, of the object insured.

There is certainly not the same reason for prohibiting an assignment after a loss as before. After the loss the confidential relation of insurer and insured no longer exists, but a new relation has arisen out of it, to wit, that of debtor and creditor; and it is difficult to see any reason connected either with public policy or the proper rights of the former, why the latter should not be permitted to deal with and concerning this right in action as he is permitted to do in respect to any other absolute right, and transfer the same in payment of debts or to meet the other necessities of business. Ordinarily, it is of the first importance that those who have sustained loss by fire should immediately realize the amount of their insurance, to replace the property destroyed, and it is not unfrequently indispensable, to prevent the utter ruin of the sufferer, that he should receive prompt aid by means of his insurance; and if the company cannot, or will not, pay promptly, he should be permitted to anticipate his claim by transferring it, either by sale or pledge. If he cannot do this, he may be in the power of the company and subjected to such terms as the managers may see fit to impose. They may say, in effect, to the man who has bargained with them for absolute indemnity, and to whose business prospects delay is utter ruin, or whose family are in pinching want for the relief which this indemnity would afford, "accept of the pittance we offer, or we will contest your claim and avail ourselves of such delays as litigation will afford; and as you cannot realize the amount by sale or pledge, without incurring a forfeiture of the claim, you must await our inclination, or the slow result of a lawsuit, before you can recover the money to which you are entitled, and which you so much need." Public policy forbids that the debtor should, without any reason except such as grows out of caprice, or some worse motive on his part, have this power over his creditor. It is also unjust to the creditors of the insured. It is the policy of the law to place all the property of a person within the reach of his creditors, and there is no reason why a claim against an insurance company should be an exception.

Nothing can be taken against the defendant upon the ground

Acts of Agent.

that the insured never read or knew of the condition until the objection was taken after loss, and after the assignment; but were this a case for presumption, it would be fair to say that, in all probability, this, like most of the conditions introduced by insurers from time to time in their contracts, for their own benefit, passed unnoticed by the ones most interested. Most new conditions are first brought to light by a litigation in which new and before unheard-of objections are taken by the underwriters, upon some of their new provisions.

I am of opinion that the contract of insurance proper terminated with the loss, and an absolute debt then upon furnishing the proofs by the insured accrued against the company, and that the provisions relied upon ought not to be allowed to defeat this absolute claim. The judgment should be *Affirmed.*

The foregoing case is not very intelligible. It is not clear, as we have stated in giving the facts, whether the company's agent had done anything before the loss to cause the assured to delay paying the premium. Probably he had. In 25 Barb. 190 it is said: "The premium was not paid until after the loss; the agent of the defendants telling the insured that it was immaterial; that he did not care to receive it until he made his returns, and he would call for it." This is not clear, but the most natural meaning seems to be that this conduct of the agent was before the loss. If not, the case is very clearly wrong, unless the court are right in holding that the acknowledgment of receipt of premium is conclusive evidence of payment. But the authorities are nearly all opposed to this. See May on Insurance, 432; 2 Story on Contracts, § 1353 (5th ed.); Bigelow on Estoppel, 313-318, and cases cited. The rule of law in marine insurance is otherwise, for peculiar reasons, which do not apply to fire and life insurance. See Arnold on Mar. Ins. 180, 181 (4th ed.).

But though the conduct of the agent was (probably) prior to the loss, the case still stands on doubtful ground. *Parol* waivers have in several cases been rejected when consisting merely in a statement by the company that they will not take advantage of a provision in their favor. See *Lampkin v. Western Assur. Co.*, post, 18; *Phanix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 13; *Ketchum v. Protection Ins. Co.*, ante, vol. 2, p. 698; *Odiorne v. New England Marine Ins. Co.* 101 Mass. 551; *Gooden v. Amoskeag Ins. Co.*, ante, vol. 3, p. 1. Unless there is a valid agreement for a waiver, it would seem that the company, to be estopped, must have done something akin to preventing the performance of the condition; such, for instance, as proposing terms for compromise and encouraging their continuance under a promise not to take advantage of the limitation clause. See *Gooden v. Amoskeag Ins. Co.*, supra; 3 Bigelow, 70, note. The principal case was overruled in *Sheldon v. Atlantic Ins. Co.*, post.

FREDERICK ROTH vs. THE CITY INSURANCE CO.¹ (Circuit Court, United States, April, 1855.) *Acts of Agent.*

If an agent of an insurance company make the survey of the property to be insured, and the statements of the application, being as well acquainted with the situation of the

¹ 6 McLean, 325.

False Swearing.

property as the assured, the company will be liable, notwithstanding any misrepresentations. But if the survey and application be filled upon the statements of the assured, the agent having no knowledge of the premises, it is otherwise.

Where the form of the instructions required the assured to apply to an agent of the company, if there was an agent in his district, and if the assured should undertake to make the survey and statements himself, he should be held strictly to conform to the requirements to make a valid policy; this would seem to imply that if the agent be called upon to make the survey and statements, and does so, the assured is not bound for the accuracy of the representations.

FRANKLIN INSURANCE CO. vs. CULVER.¹

(Supreme Court, Indiana, May, 1855.)

False Swearing.

The condition of an insurance policy issued to the plaintiff provided that persons sustaining loss by fire should forthwith give notice thereof, in writing, to the company or their agent, and as soon after as possible deliver as particular an account of their loss as the nature of the case would admit of (and if within their power, render to the company a schedule of the articles destroyed or damaged, stating article by article), signed with their proper hands, and that they should accompany the same with their oath or affirmation, declaring the account to be just, &c., and what was the cash value of the subject insured. Whenever demanded in writing, they were also required to produce an exhibit of their books of accounts, and vouchers in support of their claim, and permit extracts and copies thereof to be made, &c. The conditions further provided that any fraud or false swearing by the insured should cause a forfeiture of all claims, and be a bar to all remedies under the policy. In a suit upon the policy for a loss of the subject insured, the plaintiff exhibited the statement furnished by him to the company under oath, as follows: "One-story frame-house, 200 dollars; dry goods, 1,000 dollars; groceries, 150 dollars; queensware, 25 dollars; hardware, 25 dollars; the whole, 1,400 dollars." The statement further showed that all the bills of goods purchased by him were consumed by the fire, and that he was therefore unable to make out an invoice of the items and cost of the articles destroyed, but that to the best of his knowledge and belief, said statement was true and just, and the fair cash value of the goods was between 1,400 and 1,500 dollars. It also appeared in evidence that the plaintiff's invoices were consumed with his goods, and that he had no copies, and that the company's secretary had called on him to sign an instrument requesting the persons from whom he had purchased the goods to furnish the amounts of the invoices, but that he had refused to do so. The plaintiff obtained a verdict and judgment for 200 dollars less than the amount of his loss as alleged in his statement to the company. *Held*, that the plaintiff was not required by the conditions of the policy to sign the instrument presented by the company's secretary. *Held*, also, that the excess of the plaintiff's claim, as furnished to the company, over the verdict, did not show him to have been guilty of "false swearing." *Held*, also, that by "false swearing" was meant, the swearing to a false statement knowingly.

An instruction will be presumed to have been pertinent to the evidence, where the contrary does not appear.

APPEAL from the Johnson circuit court.

DAVISON, J. Assumpsit by Culver against the Franklin Insurance Company, upon a policy against fire, for \$1,400, on a storehouse and stock of goods, viz. \$200 on the house and

¹ 6 Ind. 137.

False Swearing.

\$1,200 on the goods. The policy was issued March 10, 1852, for one year from that date, and on the 3d of April following, the storehouse, with all the goods, was consumed by fire. Plea, the general issue. Verdict in favor of the plaintiff for \$1,200. New trial refused, and judgment.

The policy, among other conditions, contained the following: "Persons sustaining loss by fire shall forthwith give notice thereof in writing to the company or their agent, and, as soon after as possible, deliver as particular an account of their loss as the nature of the case will admit (and if within their power, render to the company a schedule of articles destroyed or damaged, stating article by article), signed with their proper hands; and they shall accompany the same with their oath or affirmation declaring the said account to be just," &c.; "also what was the cash value of the subject insured," &c. "And whenever required in writing, the insured shall produce an exhibit of their books of account and vouchers to the insurers, in support of their claim, and permit extracts and copies thereof to be made," &c. "Any fraud or false swearing by the insured shall cause a forfeiture of all claims, and shall be a full bar to all remedies under the policy."

The property destroyed, and its value, was stated by Culver, under oath, to be as follows: "One-story frame storehouse, 200 dollars; dry goods, 1,000 dollars; groceries, 150 dollars; queensware, 25 dollars; hardware, 25 dollars; the whole, 1,400 dollars."

His statement further shows that all the bills of goods purchased by him were consumed by the fire, and he was, therefore, unable to make out an invoice of the items and cost of each article destroyed; but that to the best of his knowledge and belief, the above was true and just; and that the fair cash value of said house and goods was between \$1,400 and \$1,500, according to the best of his judgment.

All the evidence is not set out in the record; but it was shown that the plaintiff's invoices were consumed with his goods, and that he had no copies; that the defendants' secretary had called on him to sign an instrument in writing, requesting the persons from whom he had purchased the goods to furnish the amounts of the invoices, but that he declined doing so.

In relation to this evidence, the court charged, that "if the

False Swearing.

plaintiff furnished the names of the merchants from whom he had purchased, he did all that was his duty *prima facie*. Had the defendants applied to the names furnished for copies of the invoices, and they had declined furnishing them without the plaintiff's consent, his refusal to give it would afford a strong presumption in favor of a low assessment."

This instruction is said to be objectionable. We are not of that opinion. There is nothing in the considerations annexed to the policy which required the plaintiff to sign the instrument proposed by the defendants' secretary. The charge must be presumed to have been pertinent to the evidence, and it may, therefore, be inferred that there was evidence tending to show that the plaintiff furnished the names of the merchants from whom he purchased; also that there was no proof that they declined for want of his consent. This being the case, we think the jury were correctly instructed.

The amount claimed, by the preliminary affidavit appears to exceed the verdict \$200, which excess, it is contended, shows the plaintiff to have been guilty of false swearing, and entitles the defendants to a new trial. The jury were distinctly told, that "if it appeared, from the evidence, that the plaintiff, in his sworn statement, knowingly exaggerated his loss, they were bound to find for the defendants." It cannot be assumed that this instruction was disregarded. And if it was a correct exposition of the law, the new trial was properly refused, because the point involved in the charge of the court raised a question of fact peculiarly for the consideration of the jury.

The appellant contends that the error of the instruction consists in the use of the term "knowingly;" "that false swearing knowingly is perjury, which, in law, is not synonymous with false swearing." We are not prepared to admit that interpretation as applicable to the contract before us; because it induces the conclusion that a mere mistake in the plaintiff's estimate of the property consumed would "cause a forfeiture of all his claims under the policy," which, in our opinion, would be an absurdity. No false swearing by the assured in relation to the extent of his loss should be allowed to defeat a recovery, unless it be intentionally false. *Moore v. The Protection Insurance Company*, 16 Shep. 97; ¹ *Angell on Fire & Life Insurance*, § 260, and note.

¹ *Ante*, vol. 2, p. 753.

Notice of Loss. — Increase of Risk.

In the present case, no basis existed by which the amount destroyed could be ascertained with any degree of accuracy. The invoices having been consumed with the goods, and there being no other account of the stock on hand, the statement of the insured could be nothing more than the result of his own deliberate judgment, without the means of testing its correctness by numerical calculation. Whether, in the language of the instruction, he "knowingly exaggerated his loss," was for the jury to determine. The value of the property, as estimated by the insured, it must be presumed, was properly considered with all the other evidence upon the same point. And though the jury, in view of all the facts, may have been convinced that he had erred in opinion, still they may have found such error to exist without any dishonest intention.

If the evidence was on the record we might look into it, and determine whether the verdict accorded with the proofs; but as the case stands before us, the finding of the jury must be deemed a proper conclusion from the facts proved on the trial.

PER CURIAM. The judgment is affirmed, with five per cent. damages and costs.

F. M. Finch, & S. Major, for the appellants.

G. M. Overstreet, A. B. Hunter, L. Barbour, & A. G. Porter, for the appellee.

See May on Ins. 580, 581.

NICHOLAS FRANCIS vs. SOMERVILLE MUTUAL INSURANCE CO.¹
(Supreme Court, New Jersey, June, 1855.) *Notice of Loss. — Increase of Risk,*

If the holder of a policy of insurance give notice to the company of loss, but does not give notice according to the contract of insurance, the company will be considered as waiving the informality in the notice, if, when the notice is given, they do not object to the form of it, but object to payment on other grounds. See *Taylor v. Merchants' Ins. Co.*, ante, vol. 3, p. 94.

The risk is fixed by contract, but the question whether it has been increased is for the jury. If a building be erected adjoining the insured, and in it are placed articles extra hazardous, and prohibited by the policy, it will be considered as increasing the risk, and will avoid the policy unless notice thereof is given to the company. But the contract is not broken by occasionally placing in such building, or in the building insured such articles as are in the nature of things, necessary for the enjoyment of the premises in the usual way.

The building erected was an addition to the one insured, a store, and was about twelve by fourteen feet in size. It was designed as a brewery; and no notice was given to the insurers. In this addition was placed a quantity of hay, out of which the plaintiff fed his cow until the fire. The fire was first discovered in this building where the hay was placed, from

¹ 1 Dutcher, 78.

Pleading. — Notice of Loss. — Acknowledgment of Receipt of Premium.

whence it communicated to the premises insured. The jury having found that there had been no increase of risk, the verdict was set aside as contrary to evidence.

It is to be observed of the language of the court in this case, where they speak of the omission to give notice of the new erection, that if there was thereby an increase of risk, mere notice would not be sufficient, unless there was express language to this effect in the policy (which is not set out in the original report); the assent of the company to the increased hazard would be necessary.

TROY INSURANCE CO., plaintiffs in error, *vs.* HENRY CARPENTER, defendant in error.¹ (Supreme Court, Wisconsin, June, 1855.) *Pleading. — Notice of Loss. — Acknowledgment of Receipt of Premium.*

A declaration in *assumpsit* upon a policy of insurance need not set out *verbatim* the by-laws of the company annexed to the policy.

An averment in a declaration upon a policy, stating that the fire occurred on the 2d of February, 1851, and then alleging that "immediately and within a reasonable time after the burning and destruction of the insured property, to wit, on the 3d day of February, 1851, he, the said plaintiff, forwarded to the secretary of the said fire insurance company, and which was duly received by said company, a plain and unequivocal statement, verified by his affidavit, of the time and origin of the fire," &c., is a sufficient statement of a section of the by-laws annexed to the policy, and reading as follows: "All members sustaining loss or damage by fire shall forthwith give notice thereof to the secretary, and within thirty days after said loss deliver, per mail or otherwise, a particular account of such loss, verified on oath or affidavit."

Clauses in a policy which do not affect the plaintiff's right of action need not be stated in the declaration.

An allegation that at the time of the fire there was no insurance on the property, not notified to the company, and that after the making the policy by the company no other insurance was effected on the property, is a sufficient averment that there was no other insurance upon the property, not notified to the company at the time the company insured the plaintiff.

Matters of defence need not be anticipated and averred in the declaration.

The court alleged that in consideration, &c., "the defendants then and there promised the plaintiff to insure," &c. *Held*, that this was a contract of insurance, and not an agreement to insure.

Where the by-laws annexed to a policy require notice of loss to be given to the secretary of the company, a letter of the latter to the plaintiff, acknowledging receipt of the notice of loss and the preliminary proof, and stating that the same is satisfactory, is sufficient proof of the time of notice of the loss, and the time within which it was forwarded.

Where the by-laws provide that it is the duty of the secretary of the company "to answer all communications in behalf of the company," admissions of the secretary, made in such correspondence, as to the time and sufficiency of notice of a loss, bind the company.

The acknowledgment of receipt of a premium note in a policy of insurance is *prima facie* evidence of the fact; and it is no ground for a nonsuit that the contents of the premium note have not been proved except by the policy.

¹ 4 Wis. 20.

LAMPKIN vs. THE WESTERN ASSURANCE CO.

(Queen's Bench, Upper Canada, Trinity Term, 1855.)

Limitation Clause. — Parol Waiver.

One of the conditions of a policy of insurance was that no action should be brought under it against the company, unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition; and relied upon an alleged conversation between his agent and the president of the company. *Held*, that the condition could not be so waived, and that such evidence was properly rejected. *Held*, also, that the letter set out below contained no evidence of a waiver of this condition.

COVENANT on a policy of assurance on merchandise in the plaintiff's store; amount insured, £250; allegation of total loss by fire.

In the first count, the plaintiff declared, setting out in full, as is usual, the conditions of the policy, and averring an exact compliance on his part with all the conditions, among them the ninth, which stipulated that the assurer "should give immediate notice of loss, within fourteen days, to the secretary or manager of the company, or to the agent, if there be any in the neighborhood of the property insured, and as soon after as possible shall deliver in a particular account of such loss or damage, signed by him, and verified by his oath," which should contain a statement in regard to certain matters specified in this condition; and the assured was also to produce a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, stating that he had examined the circumstances attending the fire, &c., and was acquainted with the character and circumstances of the claimant, and verily believed that he had by misfortune, &c., without fraud or evil practice, sustained loss to the amount which the magistrate should certify: "And until such proofs, declarations, and certificates are produced, the loss shall not be payable."

The fifteenth condition of the policy provided that no action should be brought or sustained against the company for any claim under the policy, unless it be brought within twelve months next after the cause of action should accrue, and in case it should be brought afterwards, the lapse of time should be taken as conclusive evidence against the validity of the claim attempted to be enforced.

The declaration, in the first count, alleged that the plaintiff did forthwith after the loss, and within fourteen days, to wit, on the 26th of June, 1853, give notice of the loss, and deliver in a particular account, &c., and that he did also produce to the defendants, under the hand and seal of John J. Huntley, a notary public most contiguous to the place of the fire, and not concerned in the said loss, &c., a certificate (such as the policy requires), and did also then produce to the defendants, under the hand and seal of John Purney, Esquire, then being a magistrate most contiguous to the place of said fire, &c., a certificate, &c.

In the second count, the plaintiff referring to the policy as stated in the first count, and the statements of loss, &c., contained in that count, averred that after the lapse of sixty days from the full completing of all things to be done and performed by him (before which time the sum insured is by one of the conditions of the policy not payable), to wit, on the first of January, 1854, and after the accruing of the causes of action against the defendants, and within twelve months from the time of such accruing, it was agreed between him and the defendants, that the defendants should waive the fifteenth condition of the policy as set forth, &c., requiring the action to be commenced within twelve months, and that any action (of the plaintiff's) might await the result of a certain action about to be brought by the plaintiff against the Ontario Assurance Company (being another company with which the plaintiff had effected an insurance upon the same goods, as set forth in the declaration), and that after the determination of such suit, he, the plaintiff, should be at liberty to proceed against the defendants on the policy, notwithstanding the lapse of twelve months in the fifteenth condition mentioned. He then averred that, confiding in this agreement, he allowed the twelve months to lapse; that the other suit referred to was determined afterwards in the plaintiff's favor, and he thereupon commenced this action.

In a third count the plaintiff set forth a waiver of the fifteenth condition as in the second count, except that he alleged the agreement respecting such waiver of delay to have been made before he had furnished the requisite proof, &c., and consequently before any breach of the covenant to pay.

The defendants, after pleading several pleas to the first count, traversing material averments in that count, pleaded, as their

eighth plea to that count, that the plaintiff did not produce such certificate of the notary public as in that count mentioned.

9th. That the notary named — viz., John James Huntley, was not the notary most contiguous to the place at which the fire occurred.

In the tenth and eleventh pleas, they made the same denials respecting the alleged certificate of the nearest magistrate.

And in other pleas the defendants traversed the agreement to waive the condition as to twelve months, which was stated in each of those counts; and they gave no other answer to those counts.

The cause was tried at Toronto, before the learned chief justice of the common pleas. The evidence at the trial respecting the alleged certificates was only to the effect that on the 5th day of August, 1853, one Purney, a magistrate, gave a certificate to the plaintiff, such in its terms as the ninth condition of the policy required; but that he was not the magistrate most contiguous to the place of the fire, but resided fourteen miles from it, there being two magistrates resident in the village of Dover where the fire occurred, and seven or eight magistrates living nearer the village than Mr. Purney did.

There was no evidence given of any certificate of a notary public, nor was any necessary (except merely for sustaining the plaintiff's case against the eighth and ninth pleas), if that from Mr. Purney were properly admissible.

The plaintiff produced a letter of the secretary of the company, Mr. Stanton, written on the 9th of November, 1853, and addressed to and received by a person who had been urging the payment of the claim, as agent of the plaintiff, in which letter he wrote, "With reference to yours of the 5th instant, respecting Hiram Lampkin's fire, I am desired by the president and board of directors to acquaint you, that the party having failed in substantiating any claim for loss by accident or misfortune, as required by the conditions of the policy, the board is not disposed to admit the same."

The plaintiff's counsel relied upon this letter as a waiver of any objection for the want of a proper certificate, and further, he offered to prove by a witness called (the before mentioned agent of the plaintiff), that about the 8th of March, 1854, being within twelve months after the fire, he called to speak to the secre-

tary about this loss, having a power of attorney from the plaintiff, who was indebted to him, to receive part of the money ; that the secretary not being present, he was referred by the book-keeper to the president of the insurance company, whom he saw ; and it was stated by the plaintiff's counsel that his conversation with the president would be relied upon as showing a waiver of all preliminary formalities of notice, certificate, &c., and also as a waiver of the condition that the assured must sue within twelve months.

The learned chief justice held that this would be no legal proof of waiver of the condition in the covenant under the seal of the company ; and he told the jury that he considered the plaintiff entitled upon the evidence to succeed upon all the issues in fact raised upon the first count, except the eighth, ninth, tenth, and eleventh issues ; and that upon these issues, and also upon the pleas to the second and third counts, he thought the defendants were entitled to a verdict. The jury found accordingly, assessing the plaintiff's damages, under the first count, at £272 10s.

ROBINSON, C. J., delivered the opinion of the court.

We are of opinion that this case was in all respects rightly disposed of upon the trial. The plaintiff undoubtedly showed no title to a verdict upon the eighth and ninth issues, because he gave no evidence whatever of having at any time produced a certificate from the notary public named, or that there even was such a notary. His failing on these pleas would not have barred his action if he had succeeded on the ninth and tenth pleas, because the policy does not require a certificate from a notary as well as from a justice of the peace, but only a certificate from the one or the other. But the plaintiff failed upon the ninth and tenth pleas clearly, as we think, because he did not prove that the magistrate he went to was the nearest magistrate, but very much the contrary ; for there were magistrates in the village, and yet the plaintiff went to one who lived fourteen miles distant, there being several also living between him and the village, or at least, nearer to the village than he lived. And it appears also in the evidence that the magistrate he went to disclaimed at first to act, on the ground that he was not the nearest magistrate ; so that the plaintiff persisted in taking his certificate, although his attention was called to the objection.

The plaintiff then failing upon all these pleas, and as we think,

inevitably, endeavors to rest his right to recover upon the second and third counts. These rest upon an alleged waiver by the company of the condition as to bringing the action within twelve months after the accruing of the cause of action; for in these counts the plaintiff himself admits that he did not sue within twelve months, and gives as his reason that the defendants — that is, the company — agreed to waive that stipulation in the policy. He showed no agreement to that effect under the seal of the company. If an agreement by the secretary in writing would be sufficient and binding on the company without any sealed release or waiver, still we think it clear that the secretary's letter did not amount to that. A waiver of a condition in a sealed instrument should at least be unequivocal; whereas, this letter of the secretary, written after the time for paying had arrived, informs the plaintiff's agent that the company declines paying, because he had failed in substantiating any claim for loss by accident or misfortune, as required by the conditions of the policy. That can be no waiver of any condition, no dispensing with any certificate, or whatever the policy required; and it has no bearing upon the stipulation about suing within twelve months, which had not then nearly expired. To supply proof of waiver, it was desired that evidence might be received of an alleged conversation between the plaintiff's agent and the president of the company, not even at the place of business of the company, the purport of which was alleged to be that the condition for a certain reason would not be insisted upon.

The learned chief justice rejected that evidence, and we think properly. In some instances the president of a trading corporation, or the president and secretary, or the president with one or more directors, have power expressly given by the charter to do certain acts, and make certain agreements, which, though only by parol, shall bind the company, — a provision which is often inserted for the convenience of the company; but there is no special provision that can be applied to this case; and whether such a conversation with the president alone would bind the company, and deprive them of the protection of the condition in the sealed instrument, depends on the general principles which govern corporate acts and liabilities; and we conceive the point admits of no doubt that the condition in this case could not be so got rid of, and therefore that it was proper to reject the only evidence

Negligence. — Misdescription. — Valuation. — Damages.

that was offered to prove the waiver which the defendants have traversed.

It cannot be contended that the president of a corporation, on general principles, and without any special provision to that effect, represents, wherever he is, the whole corporation, not merely so far as to enable him to do such ordinary matters as somebody must be intrusted to do from necessity, without referring on every occasion to the board; but to that extent, that without any communication with the other directors, he can at his mere pleasure, and by verbal agreement, deprive the company of the benefit of any or all of the protections contained in the conditions of their policy. No case, we are confident, can be found to support such a position.

Rule discharged.

As to waivers of the limitation clause, see note to *Edge v. Duke*, 3 Bigelow, 67, 70; May on Ins. pp. 589, 590.

FOLSOM vs. BELKNAP COUNTY MUTUAL FIRE INSURANCE CO.¹
(Supreme Court, New Hampshire, July, 1855.) *Alienation. — Mortgage. — Assignment.*

A mortgage of property insured by a mutual fire insurance company is not an alienation, unless there is something in the policy, charter, or by-laws of the company that makes it an alienation. See *Rollins v. Columbian Ins. Co.*, ante, vol. 3, p. 393; May on Insurance, p. 294. *Contra*, in Indiana, *Indiana Mut. Ins. Co. v. Coquillard*, ante, vol. 3, p. 212.

At common law a contract of insurance is not assignable so as to give an action to the assignee in his own name. See *Nevins v. Rockingham Mut. Ins. Co.*, ante, vol. 3, p. 376; and note to *Motley v. Manuf. Ins. Co.* lb. pp. 57, 60.

Without special provision in the charter or by-laws, whereby the assignee becomes a member of the company, the action, in case of loss, must be in the name of the assured. But if the charter or by-laws of a mutual company provide that a mortgagee as well as purchaser of buildings insured may become a member of the company by having the policy assigned, and an assignment be made and ratified, an action may be brought in the name of the assignee.

NEW HAMPSHIRE MUTUAL FIRE INSURANCE CO. vs. WALKER.²
(Supreme Court, New Hampshire, July, 1855.) *Arrest of Judgment.*

Judgment will not be arrested after verdict because a title is defectively stated.

HUCKINS vs. PEOPLE'S MUTUAL FIRE INSURANCE CO.³
(Supreme Court, New Hampshire, July, 1855.) *Negligence. — Misdescription. — Valuation. — Damages.*

Carelessness is no defence to an action upon a policy of insurance. In the absence of fraud, it is the proximate cause of the loss that is to govern. If, however, the acts done,

¹ 10 Fost. 231.

² 10 Fost. 324.

³ 11 Fost. 238.

Assignment.

or neglected to be done, are of a character tending to show design or fraud, they will be admissible evidence upon those grounds.

Where a policy of insurance was issued upon English, American, and West India goods, and among the articles lost were teas and nutmegs, and the defendants requested the court to instruct the jury that if they were satisfied that these articles were not either English, American, or West India goods, then the plaintiff could not recover; *held*, that the instructions were properly requested.

Where a by-law of a mutual fire insurance company, which was made a part of the policy, provided that "in case of loss by fire, the company will in no case pay more than two thirds on personal property and three fourths on real estate, of the actual cash value of the property at risk at the time of the fire;" *held*, that the amount of the loss was to be determined by the value of the property at the time of the fire, and not by the value at the time of the insurance.

Where a policy of a mutual fire insurance company, whose charter and by-laws permitted an insurance to the extent of two thirds the value of the property at the time of the loss, was issued for \$1,500, on a stock of goods stated in the application to be of the value of \$2,000; *held*, that the assured could recover the whole amount insured, provided there was a total loss, and the cash value of the goods at the time of the fire was \$2,250.

ETNA INSURANCE COMPANY vs. JACKSON, OWSLEY & Co.¹
(Court of Appeals, Kentucky, Summer Term, 1855.) *Insurable Interest. — What Policy covers. — Vendor's Lien.*

An agent or consignee, having the property of his principal in his possession, and responsible for it, may, and especially if he have an interest in it, though it be only for his commissions, insure it in his own name, and in case of loss recover its full value — holding all beyond his own interest in trust for the owners of the property.

Policies of insurance should be liberally construed to effectuate the intention of the assured.

A policy insuring all the articles constituting the stock of a pork-house, and all articles contained within the building described and appurtenant thereto, covers all within those buildings, without regard to the particular ownership of each or any article which was at the risk of the insured.

Contracts are to be construed according to the intention of the parties thereto. A contract was made to sell 40,000 hams, to be paid for on delivery; the hams were inspected and invoiced, but not delivered or paid for; *held*, that the contract was executory, and property not changed, and, if insured, protected by the policy.

A vendor of personal property, to be paid for on delivery, parts not with the title until payment; if the price is not paid in a reasonable time, he may resume his original ownership, as upon a rescission of the contract.

A vendor of goods not delivered, but to be paid for on delivery, has a lien on the property retained in possession for securing payment, and it is upon the presumption that the agreed price is the fair value, and cannot be enhanced by any fluctuation in the value; and if the goods be insured, the vendor is entitled to the insurance corresponding with interest insured. Any interest remaining in a vendor, who has made a contract of sale, remains protected under an existing insurance.

PEABODY & RIGGS vs. WASHINGTON COUNTY MUTUAL INSURANCE Co.² (Supreme Court, New York, September, 1855.)
Assignment.

The assignee of a policy, though the assignment was with the assent of the company, can-

¹ 16 B. Mon. 242.

² 20 Barb. 339.

Warranty. — Removals. — Reasonable Time.

not sue thereon without an interest in the property covered by the policy. But if the assignor remain owner of the property, he may recover upon it, the assignment being made merely as collateral security of a debt.

S. & J. BIGLER vs. NEW YORK CENTRAL INSURANCE CO.¹
(Supreme Court, New York, September, 1855.) *Policy. — What it covers. — Other Insurance.*

Insurance upon a saw-mill covers the machinery and fixtures in it as well as the building. A provision requiring notice of subsequent insurance is not complied with without notice of a later policy, which, though voidable, is not void on its face. Suing upon the later policy and receiving a settlement of the claim precludes the insured in an action upon the earlier policy from alleging its invalidity ; though the suit upon the second policy could have been successfully opposed.

LINDSEY, JORDAN & Co. vs. UNION MUTUAL FIRE INSURANCE CO.²

(Supreme Court, Rhode Island, September, 1855.)

Warranty. — Removals. — Reasonable Time.

Where to an application for insurance upon personal property was appended this clause : "And the said applicant covenants and agrees with said company, that the foregoing is a correct description of the property requested to be insured, as far as regards the risks and value of the same : " *Held*, that the answers to the interrogatories were simply warranties that the description of the property was correct so far as regarded the risks and value ; and that the materiality of the facts to which the interrogatories related was a proper subject of inquiry by the jury.

Where an applicant for insurance, in reply to an interrogatory respecting the situation of the building containing the property to be insured, described two small buildings, and added to the description, "both the above buildings are to be moved fifteen feet," and a loss occurred before these buildings had been removed : *Held*, that the insured were entitled to a reasonable time to make these removals, and that the jury were rightly instructed to inquire what, under the circumstances of the case, was a reasonable time.

THIS was an action upon a policy of insurance, for the value of personal property destroyed by fire. A verdict was rendered for the plaintiffs, whereupon the defendants moved for a new trial, upon the ground set forth in the court's opinion.

BOSWORTH, J. The defendants in this case take exceptions to the rulings, opinions, and charges of the court, and ask a new trial on the ground of alleged errors in the said rulings, opinions, and charges.

The first point in the exceptions taken is, — "Because the answers of the plaintiffs to the defendants' interrogatories third and fourth, in a written application for insurance, were war-

¹ 20 Barb. 635.

² 3 R. I. 157.

Warranty. — Removals. — Reasonable Time.

warranties; and the plaintiffs' testimony showed that they were not true and had not been complied with.

The second point made in the exceptions is, — "That if said answers were not warranties, they were, as was shown by plaintiffs' evidence aforesaid, misrepresentations and concealments of facts specifically inquired about; and that whether material or immaterial to the risk, they should exonerate the defendants from all liability in said contract of insurance, as the defendants by making said inquiries implied that they considered them material."

The third point made in the exceptions is, — "Because it appeared from the plaintiffs' evidence that the plaintiffs had not performed an agreement by them made in answer to interrogatory fourth, in the application aforesaid, relative to the removal of said cotton waste house."

The defendants' counsel, at the trial, upon these points by him raised to the court, moved a nonsuit, which motion was overruled, and the case submitted to the jury.

And further, the defendants except to the charge of the court to the jury, because they say they requested the court to charge that the materiality of facts specifically inquired about by the defendants in said application for insurance, and by the plaintiffs answered about in writing, were not open to inquiry by the jury, but must be by them considered material, which the court refused to do, but, on the contrary, charged the jury that the materiality of said facts was to be by them determined. And that the jury were also instructed, that in case the statement as to the waste house was considered as a warranty, the plaintiffs had a reasonable time in which to remove it, and the jury were to judge of what was a reasonable time, under the circumstances of the case.

Upon inspection of the written application for insurance, referred to in the exceptions, we find that the third interrogatory relates to the "dimensions of the building to be insured, or that containing the personal property insured," and the fourth interrogatory relates to the "distance and direction from each other, and from other buildings within four rods."

The property here insured was personal property. There were no buildings insured in the policy. There are many other interrogatories put and answered in the written application referred

to, and the whole are concluded with the following express agreement: "And the said applicant covenants and agrees with said company, that the foregoing is a correct description of the property requested to be insured, as far as regards the risk and value of the same." This concluding clause in the application itself indicates the extent of the warranty which the party making, and the party receiving it, understood the application to be. And being referred to in the policy and made a part of it, it is a warranty, according to its terms. The making the application a part of the policy cannot have the effect to make the answers to the questions put and answered a warranty of a different character than that which the application represents it to be. The giving to it such effect would contradict the terms in the policy that the application is made a part of it. The warranty is, therefore, that "the description of the property requested to be insured is a correct description, as far as regards the risk and value." If, therefore, the question of correctness of this description is disputed, it is by the terms of the policy limited to the inquiry whether it is a correct description, so far as regards the risk and value, of the goods insured. This depends upon the facts, and reasonable inferences from the facts, of the case. As to the question of value of the property, this is a question of fact purely, and as to the question of the risk of the property, as affected by the description of the buildings in which it was situated, it is, we think, equally so.

Appended to the answer to the fourth interrogatory in the application, as to the "distance and direction from each other, and from other buildings within four rods," is the statement, that "a small shed at twenty-two feet from the mill, and a small building where cotton waste is now kept — both the above buildings are to be moved fifteen rods."

If this representation and statement are to be taken as subject to the concluding clause qualifying the application as a warranty, then the question of fact is to be considered, whether it is a correct description of the property so far as regards the risk — for it obviously does not affect the value. And if the statement that the buildings are to be removed fifteen rods does not affect the risk, or if the statement is a warranty of itself, and absolutely, then, as no time is specified in the application within which they were to be removed, and time is necessarily required

to remove them, the question must arise whether a reasonable time had elapsed. The question of reasonable time is always a question of fact, except in those cases in which the law has established what is to be considered reasonable time. In a case like this, to wit, the reasonable time required to remove two buildings, no such reasonable time is or can be established by law. The nature of the case involves an inquiry as to facts, and reasonable inferences from the state of facts in the case. In cases where the law raises an inference from a state of facts, the facts being found, the law is to be pronounced by the court; but in cases where the law raises no such inference, the reasonable consequence or effect of a state of facts is as much a matter for the jury to consider as is the existence of the facts themselves.

We therefore think that the charge and rulings of the judge are not liable to the objections made by the defendants; and that the case was properly submitted to the jury, whose verdict, rendered upon proof of facts of which they were the proper judges, must remain as the foundation of the judgment of the court.

JONATHAN C. FORBUSH *et al.* vs. WESTERN MASS. INSURANCE Co.¹ (Supreme Court, Massachusetts, October, 1855.) *Other Insurance. — Damages.*

A policy is not avoided by a statement that the property insured is covered by another policy, which contains a provision that has not been complied with, that subsequent insurance, not assented to by the company, shall render it void.

In such case the subsequent insurers will be liable for the whole amount of loss up to the sum insured by them.

ABNER C. JACKSON vs. FARMERS' MUTUAL FIRE INSURANCE Co.² (Supreme Court, Massachusetts, October, 1855.) *Other Insurance. — Increase of Risk. — Incumbrance. — Parties.*

The policy in question provided that if other insurance should be obtained without the consent of the company the contract should become void. Another policy was thus obtained, containing a provision that an increase of the risk by the assured should render the agreement void. *Held*, that the provision of the policy in suit was not broken if there had been an increase of risk under the other policy.

The fact that a prior valid policy of insurance, subject to a lien of the insurance company, has once existed upon the property, which prior insurance has become invalid by an increase of risk, though the policy has not been cancelled or surrendered at the time of the insurance in litigation, does not come within the terms of a provision in the later policy requiring a disclosure of incumbrances.

¹ 4 Gray, 337.

² 5 Gray, 52.

Revocation of Agency. — Acknowledgment of Receipt. — Waiver, etc.

A mortgagee, to whom a policy is made payable in part in case of loss, may sue thereon in his own name, even for a less sum than that named as his interest. See *Molley v. Manuf. Ins. Co.*, *ante*, vol. 3, p. 57, and note p. 60.

J. MICHAEL vs. MUTUAL INSURANCE CO. OF NASHVILLE.¹

(Supreme Court, Louisiana, November, 1855.)

Revocation of Agency. — Acknowledgment of Receipt. — Waiver. — Examination of Premises.

A foreign insurance company, doing business in New Orleans, through an agent, cannot be permitted to frustrate a claim in Louisiana upon a contract made with it, by revoking the power of its agent on the eve of the institution of a suit for a loss, of which it has been notified.

Insurers are estopped from denying payment of the premium where there is an acknowledgment in the policy, unless they can show that the acknowledgment was made in error, by fraud or duress.

Where insurers plead nonpayment of the premium as a bar to recovery on a policy, and in a supplemental answer alleged misrepresentation and concealment, the first is waived. When premises insured against loss by fire have been thoroughly examined by the agent of the insurers, it is conclusive upon the insurers as to whatsoever is apparent.

APPEAL from the third district court of New Orleans.

Roselius, for plaintiff.

Semmes, for defendants and appellants.

BUCHANAN, J. Plaintiff insured a stock of goods in his store at Bayou Sara against fire, for one year, viz., from the 3d February, 1852, to 3d February, 1853. The store was destroyed by fire and the stock of goods consumed on the 27th August, 1852. This suit was instituted on the 14th October, 1852, on the policy of insurance, executed and signed at New Orleans, by William A. Johnson, as the agent of the defendants, a company domiciled in Nashville, Tenn. The petition and citation were served on the 8th November, 1852, on the said Johnson, who filed for exception, that he was no longer the agent of defendants, "the agency of said insurance company in New Orleans having been some time since withdrawn." In support of said exception a telegraphic dispatch was given in evidence, dated Nashville, 29th September, 1852, and received in New Orleans the same day, of the following tenor: "Trustees have withdrawn agency at New Orleans; decline risks after 1st October."

The district judge properly overruled the exception. A foreign insurance company, doing business through an agent in New Orleans, and taking risks in Louisiana, cannot be permitted to

¹ 10 La. An. 737.

frustrate a claim in a Louisiana court upon a contract made with it, by revoking the power of its agent on the eve of the institution of a suit for a loss, of which it has been notified. Such a proceeding savors of bad faith. The dispatch in question is even suspicious and contradictory in its terms. On the 29th September, Johnson is informed that the trustees have withdrawn their agency at New Orleans; and yet he is authorized to receive new risks on their account up to the 1st October, inclusive, being full two days later than the date of the dispatch and of its reception.

The exception being overruled, the defendants appeared by counsel and filed their answer, denying their liability, on the special ground that the premium had not been received by Johnson, their agent, and that said Johnson was without power to bind them "until the actual payment of the premium of insurance."

It is proved that plaintiff paid the premium upon the policy sued upon to the person from whom he received that policy, and who appears to have been an itinerant insurance broker, through whom this contract was made between the parties, one of whom resided at Bayou Sara, and the other at New Orleans. Defendants intrusted the policy to this itinerant broker for delivery to plaintiff, and he was the proper person to whom to make payment of the premium.

Besides, the defendants are estopped by the acknowledgment contained in their contract from denying the payment, unless they can show that the said acknowledgment was made in error, or induced by fraud or duress, nothing of which is pretended. This acknowledgment is in the following words: "In consideration of ninety-three dollars and seventy-five cents, paid to William A. Johnson, their authorized agent, by the insured hereafter named, the receipt of which is hereby acknowledged," &c.

It was, perhaps, unnecessary for us to have noticed this plea of nonpayment of the premium, as, by a supplemental and amended answer, the defence has been put upon a different ground, to wit, that the plaintiff was guilty of misrepresentation in his description of the premises insured, and concealed essential particulars, which, if known, would have prevented defendants from insuring at all, or only at a great increase of premium. The first plea, which was, in substance, that there was no con-

tract, is inconsistent with the second, which alleges the contract to be void for fraudulent concealment; and, consequently, according to correct rules of pleading, is to be viewed as waived by the amended plea.

Upon this defence it is proved that plaintiff, in his application for insurance, made no mention of the fact that there was an eating-house, bar-room and billiard saloon kept by another person in another portion of the building in which his dry goods store was situated. It is proved that the premises were thoroughly examined by the insurance broker through whom plaintiff's application was transmitted; and such inspection is declared by a president of an insurance company, examined as a witness for defendants, to be conclusive upon the latter.

It is therefore adjudged and decreed, that the judgment of the district court be affirmed, with costs. *Rehearing refused.*

ABBY W. ALLEN vs. CHARLESTOWN MUTUAL FIRE INSURANCE Co.¹ (Supreme Court, Massachusetts, November, 1855.)
Representations of Title. — Construction.

A mutual policy declared the application a part of the contract, and provided that if it did not contain a full, fair, and substantially true statement of all the facts concerning the property, within the knowledge of the applicant, and material to the risk, the insurance should be void. The applicant, in answer to the question whether she owned the land upon which the buildings to be insured stood, replied, "Yes." She was a widow, having a life estate under her husband's will, which made no disposition of the remainder. The deceased left children not named in the will; but, though twelve years had elapsed, they had never claimed the share to which they would have been entitled had he died intestate. *Held*, not such a misrepresentation as to avoid the policy.

In this case, in answer to a question as to the relative situation of other buildings, the application mentioned two buildings "with fifty feet." *Held*, that the words quoted meant within fifty feet, and the policy was not avoided though one of the buildings was within two feet of the property insured.

JOSEPH W. HASKINS vs. HAMILTON MUTUAL INSURANCE CO.²
(Supreme Court, Massachusetts, November, 1855.) *Practice. — Repairs. — Reasonable Time. — Experts.*

The defendants cannot, under the statute, take advantage of a misrepresentation of the assured not specified in their answer, though disclosed in the plaintiff's evidence. See *Mulrey v. Mohawk Val. Ins. Co.*, post.

The question whether repairs were completed by the insurers within a reasonable time, *held* properly submitted to the jury.

It was provided in the defendants' by-laws that "the directors may, within a reasonable time, rebuild, repair, or replace the property lost or damaged," upon security for one third the expense being furnished by the assured, and that the company should not be

¹ 5 Gray, 384.

² 5 Gray, 432.

Powers of Agents. — Warranty.

"liable to any action for the loss, until such security shall have been furnished, nor unless the company shall neglect for thirty days thereafter to proceed to rebuild, repair, or replace" the loss. *Held*, that the assured, having duly given the said security, might sue upon the policy in case of a failure on the part of the company to complete repairs within a reasonable time.

The opinion of a witness as to the value of machinery *held* admissible on proof that he had owned the machinery for a year; that he had bought it, run it for that time, worked in the mill with it, and sold it, and that while he owned it he had made estimates of the cost of building such machines, and had procured estimates from other machinists on the point; that he had had it repaired, and various parts of it renewed, and knew the cost thereof.

GLOUCESTER MANUFACTURING CO. *vs.* HOWARD FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, November, 1855.)

Powers of Agents. — Warranty.

A general agent of an insurance company, who had authority to issue policies executed by the company, *held* to have power to add to a policy before the contract is completed a memorandum that the building insured is in the course of construction.

A statement in the policy that "water tanks [are] to be well supplied with water at all times," is complied with by the work on the tanks appearing to be well advanced when the risk was proposed, and their construction continued with reasonable diligence afterwards.

THE following report of the trial was made by Thomas, J.: The plaintiffs proved that Gillett & Coggeshall, for some time before the 9th of October, 1851, were the agents of the defendants at Philadelphia, advertised as such in the newspapers, and were intrusted with policies, like the one declared upon in all their printed parts, signed by their president and secretary, and to be filled up, indorsed, countersigned, and issued by said agents; that the policy declared on was made out and countersigned by said agents on the 14th of October, 1851, with the exception of the memorandum in the margin, and remained in their possession until the 8th of December, when the plaintiff's treasurer called for it, and, on examination, refused to receive it in that form, and thereupon said agents made and signed the memorandum in the margin, and said treasurer took the policy and paid them the premium.

The defendants offered to prove that Gillett & Coggeshall were directed to send to the defendants, at the end of each month, copies of the written parts of all policies issued by them, and of any indorsements thereon made by them; but it was not proved that these directions were complied with, or were known

¹ 5 Gray, 497.

to the plaintiffs. It was proved that said agents, about the 1st of November, 1851, without the plaintiffs' knowledge, sent the defendants a copy of the written portions of this policy, and of the survey, and paid them the amount of the premium; and that the defendants' officers did not know of the memorandum of December 8th, or that the buildings insured were in the course of construction, until after they were burnt. The loss by fire within the time, and due notice thereof, were admitted.

The defendants also offered to prove, by parol, that Gillett & Coggeshall were not authorized to dispense, by indorsement or otherwise, with any of the requirements of the conditions upon which the policies were issued, or with a full, true, and exact description of the buildings insured, and the risk assumed in the survey or application to be signed by the assured. This evidence was objected to by the plaintiffs, and rejected by the court.

It was also proved that when the application was signed, and until the loss, the buildings insured were not completed, but in the course of construction, and that there were no water tanks upon the premises; but a tank had been begun in the place and of the size designated in the plan annexed to the application, and others elsewhere, and that the plaintiffs had proceeded in the construction of these tanks as fast as is usual in the construction of a bleachery, and without unreasonable delay.

Upon the evidence, the court, for the purposes of the trial, ruled that if the plaintiffs did not pay the premium on the policy until the 8th of December, and the policy was not delivered to them until that time, and their agent refused to take it until the indorsement of December 8, 1851, had been made by Gillett & Coggeshall, then the defendants would be bound by such indorsement; and that, upon the facts proved, the plaintiffs were not bound to have tanks in the building insured, filled with water at all times from the commencement of the risk, or to show that there was a large tank in the place indicated on the plan from the commencement of the risk; but that if these tanks were in a reasonable state of forwardness towards completion, compared with the state of the buildings insured, and if the buildings and tanks were being finished and constructed up to the time of the fire with reasonable dispatch, and with no unnecessary delay, then the plaintiffs would be entitled to recover upon this part of the case.

A verdict was taken for the plaintiffs; to be set aside if the rulings were not correct.

DEWEY, J. This case presents the question of the agency of Gillett & Coggeshall under circumstances indicating a very general and extended agency as to issuing policies in behalf of the defendants. These agents were furnished with blank policies, which were to be filled up, indorsed, and issued at their discretion. It is fully conceded that, as to the rate of premium, the amount of the risk, and the nature of it, the power of these agents was unlimited. If the memorandum or indorsement of December 8, 1851, had been made by these agents upon this policy at the time of its original date, and before any other proceedings had taken place, we apprehend it would have been quite clear that it would have constituted a part of the policy, and properly be referred to as explanatory of the nature of the risk. It was not, however, indorsed on the policy at the time that the policy was countersigned by the agents, on the 14th of October, 1851. The question then arises as to the power and authority of the agents to make this indorsement at the later period of December 8, 1851.

Had the plaintiffs received their policy on the 14th of October, 1851, and paid the premium therefor, it might present a very different question from that now before us, which must be decided upon its own peculiar facts. Among these facts is the important one, that the policy had never been delivered, no premium paid by the plaintiffs, and nothing done which would have secured to the plaintiffs the benefits of the policy, had any loss by fire occurred to the property before the 8th of December. On the last-named day the plaintiffs, upon examination of the policy as originally prepared, refused to take it in the form in which it then was. At that time no policy had been delivered. These agents were clothed with general powers, as to filling up and issuing policies. Having the authority to make an original contract of insurance, with terms similar to those found in this policy, they had authority, before the delivery of the policy, to enlarge it from its first draft, by a change or modification of the description of the property insured, so as to embrace the case of a building unfinished, but then in the process of construction. This they did, and the policy in this form was accepted by the plaintiffs; and, as between insurers and assured, this contract

What Policy covers.

was entered into on the 8th of December, and is to be treated as of that date.

If the agents of the defendants failed to transmit to their principals a copy of the written part of this policy, as it existed at the time of its delivery on the 8th of December, with the change in the description of the state and situation of the property insured, from that which they had forwarded to the defendants in the month of November previous, the responsibility for such omission is not upon the plaintiffs.

We are of opinion that this policy is to be taken to be a policy "upon buildings in course of construction."

The further inquiry then arises, as to the effect which this qualification of the original description of the risk is to have upon the stipulation as to "water tanks well supplied with water at all times." It is contended, on the part of the defendants that this stipulation is equally operative, and requires a like literal compliance, if the policy be applied to buildings in the course of construction. But the court are of opinion that the insurance on the property having been modified, so as to be an insurance "upon buildings in the course of construction" at the time of issuing the policy, the statements in the application must be taken to be made with reference to such state of the buildings, and require a performance of the conditions or stipulations adapted to that state of things. The water tanks were to be supplied with all reasonable diligence, having reference to the progress in the construction of the buildings insured. The plaintiffs were not, under such a policy upon buildings in the course of construction, required to have at all times, from the first moment the policy issued, "water tanks well supplied with water at all times," in the manner and to the extent they would have been required to have had them, had the policy been upon a finished building.

Judgment on the verdict for the plaintiffs.

SAMUEL T. CROSBY *et al.* vs. FRANKLIN INSURANCE CO.¹

(Supreme Court, Massachusetts, November, 1855.)

What Policy covers.

The policy in the present case insured the plaintiffs in "\$12,000 on their stock of watches, watch trimmings, &c., . . . and \$500 on their furniture and fixtures." *Held*, that

¹ 5 Gray, 504.

What Policy covers.

the policy covered the general stock of goods of the plaintiffs, and was not limited to watches, watch trimmings, and watch materials.

THE case is stated in the opinion of the court.

THOMAS, J. This is an action of contract upon a policy of insurance. The case comes before us upon a report of the evidence. The making of the policy and a loss by fire were admitted.

The question between the parties is, what goods were covered by the policy. The policy, so far as is material to the question at issue, is as follows: "This policy of assurance witnesseth that the president and directors of the Franklin Insurance Company, in Boston, do by these presents cause Crosby & Brown to be assured twelve thousand and five hundred dollars, namely, \$12,000 on their stock of watches, watch trimmings, &c., contained in their store, No. 69 Washington Street, Boston, and \$500 on their furniture and fixtures in said store."

The evidence showed that in Boston, in stores in which watches and watch trimmings are kept for sale, the stocks usually include a general assortment of silver ware, jewelry, fine hardware, clocks, watch tools and materials, Britannia ware and fancy goods; that it is invariably the case, in all establishments in Boston where a stock of watches and watch trimmings is kept, that such a general assortment as the stock the plaintiff had is kept with them; that the term "watch trimmings" includes a great variety of articles of jewelry, such as are usually worn and sold in connection with watches; among which are chains, brooches, or pins, keys, seals, pencils, lockets, rings, and charms; that the general definition of watch trimmings would be "ornaments worn in connection with watches;" that the line between watch trimmings and other jewelry could not be distinctly drawn.

The plaintiffs say the policy covered their entire stock of goods. The defendants say it covered only watches, watch trimmings, and things of a like kind, such as parts of watches, watch materials, and watch tools.

We think the policy covered the general stock of the plaintiffs, and was not limited to watches, watch trimmings, and watch materials; that there were two subjects of insurance—the stock, and the furniture and fixtures; that the word "stock" was used in opposition to and as distinguished from the words

Assessment. — Assignment. — Waiver.

"furniture and fixtures;" that upon its fair, not to say obvious construction, the policy is for \$12,000 on the stock, the leading articles of which are given, with the comprehensive *et cetera*, which extends and includes the stock usually kept in such establishments.

In the construction thus given to the contract, it is our good fortune to concur with that originally taken and acted upon by both parties in the adjustment and partial payment of the loss.

Judgment for the plaintiffs for the amount claimed.

BRYANT vs. POUGHKEEPSIE MUTUAL FIRE INSURANCE CO.¹
(Supreme Court, New York, November, 1855.) *Manufacture of Clocks.*

The defendants insured the plaintiff as a manufacturer of brass clocks. *Held*, that this was a license to him to use all such articles as are ordinarily employed in that manufacture, and to keep them on hand, and even to make them for that purpose, if it be the ordinary course of the trade to make them; though the use or keeping of such articles be prohibited by the printed terms of the policy as extra hazardous. The written license controls the printed words.

HALE vs. UNION MUTUAL FIRE INSURANCE CO.²

(Supreme Court, New Hampshire, December, 1855.)

Assessment. — Assignment. — Waiver.

According to the by-laws of a mutual fire insurance company, if the insured neglected, for ten days after demand, to pay an assessment, the risk on his policy was suspended till the assessment was paid. The insured, fourteen months after the risk on his policy had been thus suspended, sold his property and assigned his policy to the purchaser; and the company, without giving notice to the assignee that the risk was suspended, or the assessment unpaid, assented to the assignment. *Held*, that the company must be considered to have waived their right to insist on the objection.

THE twelfth article of the by-laws of the company is as follows: "If the insured shall neglect for the space of ten days, when personally called on, to pay any premium or assessment upon either class of property, the risk of the company on the policy shall be suspended till the same is paid. But if the insured shall refuse to pay any assessment, the directors may terminate the same by giving notice thereof in writing, either personally or by mail, to the insured, provided such termination

¹ 21 Barb. 154.

² 32 N. H. 295.

shall not affect the validity of the policy or note, so far as respects past dues."

The sixteenth article of the by-laws provided as follows: "When the title of any property insured shall be changed by sale, mortgage, or otherwise, the policy shall thereupon be void; but if the grantee or alienee have the policy assigned to him, he may, upon application to the directors, if they consent within thirty days after such alienation, on giving proper security, have the same ratified and confirmed in force for his benefit, with all the rights, and subject to all the liabilities to which the original party insured was entitled and subjected."

The first assessment was made on the policy, January 1, 1851, and on the 13th of March, 1851, committed for collection to an agent of the defendants, at Lebanon, Maine. On the 28th day of June, 1851, payment of the assessment having been demanded of the plaintiff on the 13th of March, 1851, and refused, the agent returned the assessment as uncollectible. On the 26th of December, 1851, the assessment was recommitted to the same agent for collection.

A second assessment was made January 1, 1852, and on the 3d of March, 1852, was committed for collection to the same agent.

On the 27th day of July, 1852, the agent again returned the first assessment as uncollectible, and the directors thereupon on that day cancelled and discharged the policy, and that assessment has never since been paid.

Between the 27th of July, 1852, and the 5th of January, 1853, the defendants' agent collected of the plaintiff the second assessment, and on the last named day paid the amount to the defendants. Notices of both assessments were given by advertisement, and by notice through the post-office, as required by the charter and by-laws, and by the vote of the directors immediately after they were made. Payment of the first assessment was demanded of the plaintiff personally, and refused, contrary to the provisions of the by-laws.

PERLEY, C. J. On this case the defendants have set up two grounds of defence: first, that the policy was discharged and vacated by the directors on the 27th of July, 1852, before the loss happened; second, that the insurance was suspended from and after the 24th of March, 1851, by the neglect of the plain-

tiff to pay the assessment of January, 1851, which was demanded March 13, 1851, and continued to be suspended down to the time of the loss. It is understood that the defendants now waive the first of these objections, and rely on the second.

The plaintiff contends that the by-law relied on by the defendants is void, because it is in conflict with the act of incorporation, and with the contract of the defendants; and also maintains that the true construction of the by-law requires of the company some act to suspend the risk; whereas, the defendants insist that the risk, under the by-law, was suspended by the mere lapse of ten days after the neglect of the plaintiff to pay the assessment on demand.

The plaintiff also takes the ground that, on the facts appearing in this case, the defendants must be held to have waived their right to insist on this defence as against Davis, the mortgagor and assignee of the policy.

Taking the by-law to be valid, and giving to it the construction contended for by the defendants, how does the case stand on the other point?

On the 23d of May, 1852, Hale, this plaintiff, sold the premises to Davis, and assigned to him the policy, and to secure the purchase money, Davis mortgaged back the premises, and with the mortgage reassigned the policy for additional security. Davis was interested in the policy after the assignment to the plaintiff, and is interested in the loss, because, if the plaintiff recover, the money will be applied to extinguish or reduce his debt to the plaintiff, and this interest of Davis will be protected in a suit at law. *Albee v. Little*, 5 N. H. 277.

What state of facts existed on the 23d of May, 1852, when Davis purchased the premises and took his assignment of the policy? An assessment had been made on the 1st of January, 1851, which had been demanded on the 13th of March, 1851, and payment refused; and by virtue of the by-law, on the construction given to it by the defendants, the risk had become suspended on the 23d of March, 1851, and remained suspended at the time of the assignment. This assessment had been returned on the 28th of June, 1851, as uncollectible; and on the 26th of December, 1851, had been recommitted to the same agent for collection, and was then in his hands uncollected; and since the recommitment the directors had received no information from the

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agent on the subject. In the mean time a second assessment had been made on the policy, and committed for collection to the same agent on the 3d of March, 1852.

It was obviously material for Davis, when he was about to take an assignment of this policy, to be informed of this state of facts; for the insurance on the policy was then in fact suspended, and would remain so until the old assessment was paid, and the whole object of the assignment would be defeated unless this objection were removed.

It is argued for the defendants that the directors did not then know that the assessment remained unpaid, as it was then in the hands of their agent, from whom they had received no advices on the subject, and that they could not be expected to communicate a fact of which they themselves were not informed. They knew, however, that the assessment of January 1, 1851, had been demanded and payment refused, and that the risk had remained suspended from the 23d of March, 1851, to the 26th of December, 1851; that the assessment had been returned by the agent as uncollectible; had been committed again to the same agent, and no information received from the agent, from which it would be inferred that the assessment had been paid and the insurance thereby revived. Had Davis received from the directors the knowledge on the subject which they possessed, he might have well declined to take an assignment of a policy which, so far as the information went, was then invalid, and had been so for more than a year; or, if he had decided to take an assignment, with this information he would have been in a situation to see that the assessment was seasonably paid, and the insurance restored. It was, therefore, material and essential that Davis should have the knowledge which the directors possessed, if they intended to rely on the objection that the assessment remained unpaid; for without that knowledge he would be trusting to a security that was tainted with a defect which would defeat the whole object of the arrangement he was making to obtain an assignment of the policy.

There is no evidence in the case from which it could be inferred that Davis had any actual knowledge on the subject. If it was his own fault that he remained in ignorance of a fact which, if allowed to be insisted on, would defeat the whole object of the assignment, he cannot complain. But if his ignorance was owing

to the neglect of the defendants to communicate information which they were bound to disclose, they cannot now set up the fact suppressed, to defeat this action.

As a general rule, corporations have power to waive their legal rights, and are bound by implication and estoppels *in pais*, like natural persons. They can claim no exemption from the operation of those rules and maxims which are established to enforce good faith and fair dealing among individuals. Angell & Ames on Corporations, 216; *Heath v. Franklin Ins. Co.* 1 Cush. 257;¹ *Clark v. New England Ins. Co.* 6 Cush. 842.² And there is nothing in this case to take it out of the general rule. The directors had power to waive the right of the corporation to insist on the suspension of the risk for nonpayment of the assessment.

The by-law was annexed to the policy, and Davis, when he took the assignment, must be supposed to have known that if an assessment had been demanded and remained unpaid, the risk would be suspended until it was paid. Was he, as a man of common prudence, bound to suspect that the defect set up in defence to this action existed in the insurance, and to inquire until he ascertained how the fact was?

It was then a year and near five months since the first assessment had been made; the risk had been suspended, for neglect to pay, a year and two months; the directors had in the mean time made another assessment on the policy; he applied to the directors for their assent to the assignment, which they gave, and thereby, in the language of the by-law, "ratified and confirmed it to him." And yet they said nothing to him of any defect in the insurance. We think he had a right to suppose that he was taking a valid and available insurance, and not one that was tainted with a defect, which had already made it inoperative for more than a year. If the directors meant to insist on this objection, they should have spoken then; and not having spoken then, but having allowed Davis to take the assignment without notice of the objection, they must be understood to have waived it, and cannot now be permitted to set it up to defeat an insurance to which Davis had innocently trusted till the loss happened.

In *Albee v. Little*, 5 N. H. 277, the note in suit was not negotiable, but had been assigned, and the action was prosecuted for

¹ *Ante*, vol. 3, p. 634.

² *Ante*, vol. 2, p. 131.

the benefit of the assignee. The defendant offered to prove that the note was discharged, by payment made to a third person, pursuant to an agreement in writing between the parties to the note, made at the date of the note; but it appearing that the defendant was informed of the assignment, and gave no notice of the agreement, it was decided that he could not set up that defence, but must be held to have waived his right to set off the money paid under the agreement in answer to the action. The court say: "The answer to the set-off is, that although the defendant had notice of the assignment of the note to Bunce nine months before it became due, he gave no notice of the agreement between him and the plaintiff to Bunce, but kept that matter concealed. And we are of opinion that such a course must, under the circumstances, operate as a waiver of the right to take advantage of the set-off, and as an acquiescence in the assignment of the note to Bunce." *Tyler v. Yates*, 3 Barb. Sup. Co. 222, is to the same point.

It is contended that, as in the terms of the by-law the assignee takes the policy, with the rights of the assignor, and no others, Davis would stand in the place of Hale, who knew all the facts, and that he would, under the by-law, have no higher rights than Hale.

But the by-law in this respect does no more than state the general rule of law applicable to assignments of *choses in action*. Every defence may be made to an action brought in the name of the assignor, for the benefit of the assignee, that would be made if the equitable interest remained in the original party. This is the legal right of the defendant; but this legal right may be waived by the conduct of a defendant, as in the case of *Albee v. Little*, so that he will not be allowed to set up a defence that would have been valid against the assignor. Indeed, these cases of waiver by implication and estoppels *in pais* go generally upon the ground that the party has so conducted himself that he cannot be permitted to set up the right he had under his contract or his title. On this case the

Plaintiff is entitled to judgment.

Misrepresentation. — Statements of Company's Agent.

PINKHAM vs. MORANG & THE MONMOUTH MUTUAL FIRE INSURANCE Co., trustees.¹ (Supreme Court, Maine, Kennebec County, 1855.) *Misrepresentations of Title. — Tax Deed.*

The applicant for insurance in a mutual company, entitled to a lien on buildings, stated that the building to be insured belonged to him; and in support of the statement at the trial produced a tax title. But he offered no evidence to show that the collector made his return of the sale within the time prescribed by law. *Held*, that the tax title must be regarded as fatally defective. See *Shimmin v. Inman*, 26 Maine, 228; *Andrews v. Senter*, 32 Maine, 394.

The assured also claimed title under a mortgage which had been foreclosed. But it appeared that the mortgage originally stood in the joint names of two parties, and that the foreclosure was made under an assignment of the interest of only one of the mortgagees. There was no evidence that the other mortgagee had parted with his interest. *Held*, that the title therefore being defective as to half the premises, the representation of title was not sustained.

SMITH vs. CASH MUTUAL FIRE INSURANCE COMPANY.²
(Supreme Court, Pennsylvania, Philadelphia, 1855.)

Misrepresentation. — Statements of Company's Agent.

A policy of insurance was effected upon a stock of store goods, it being stipulated in the conditions of insurance that "a false description by the insured of a building or its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same," shall render the policy void; and the survey or description shall be taken "to be a warranty on the part of the assured." It was also agreed in the application for insurance that any misrepresentation or concealing of facts in effecting the insurance shall render the insurance void. The store was described as containing a chimney, and stove-pipe passing "through crock and well secured;" whereas, there was no chimney and no crock; and in the night of the day after a fire was kindled in the store, the storehouse and goods were burned, no proof being made as to the cause of the fire. *Held*, that the policy was void; and that, too, though the statements were known to be false by the company's agent, who prepared the description as made, and informed the plaintiff that it was only necessary to construct the chimney and secure the pipe before putting fire into the building, especially as this was a mutual company.

THIS was an action of debt by James G. Smith against the Cash Mutual Fire Insurance Company, on a policy of insurance dated 23d July, 1852, for one year, for \$1,000, upon a stock of store goods, contained in a frame building of one and a half stories, situate in Washington township, Wyoming County. The act of incorporation was passed on 14th April, 1851. Acts, 543.

In the conditions of insurance, referred to in the policy, it was provided as follows: —

"Applications for insurance must specify the construction and materials of the buildings to be insured, &c. And a false de-

¹ 40 Maine, 587.

² 24 Penn. St. 320.

Misrepresentation. — Statements of Company's Agent.

scription by the insured of a building or its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, or in a valued policy an over-valuation, shall render absolutely void a policy issuing upon such description or valuation.

“And if any survey, plan, or description of the property herein insured is referred to in this policy, such survey, plan, or description shall be deemed and taken to be a warranty on the part of the assured.

“The company will not be answerable for any loss arising from the use of fires in buildings unprovided with good and substantial stone or brick chimneys,” &c.

The building was owned by another person. In the application the building was described as containing goods, with a wing extending back for a store-room. One chimney, one stove. Stoves well secured; pipe pass through crock, well secured.

It was, *inter alia*, added: “Any misrepresentation or concealing of facts, in effecting this insurance, shall be deemed not only a sufficient cause for cancelling any policy, but render the insurance void.” Signed by the applicant.

The receipt of R. C. Smith, the agent of the company, for the premium of \$11.50, was dated August 2, 1852.

The building with the store goods was destroyed by fire on the night of Saturday, the 16th October, 1852. The plaintiff was absent at the time. The person who had charge of the store testified that there was no fire that he knew of in the store the night the building was burned. That he put up the stove on Friday afternoon, and was about kindling a coal fire, but being admonished, he let the wood fire die out; and, on Saturday morning, he took the stove-pipe off. He said he was sure there was no fire left in the stove; he did not think the fire was accidental. The stove-pipe went up through the chamber floor and out of the side of the house. There was no chimney in the store.

The agent of the company testified that he took the survey when the policy was made, and filled up the application. He was the agent of the company “to receive applications and to take insurances through this county.” He transmitted this application to the company.

The plaintiff offered to prove by R. C. Smith, the agent, who

Misrepresentation. — Statements of Company's Agent.

made the survey, &c., and by other witnesses, that "at the time the application was made, the said agent was informed that there was no chimney in the building, and that the stove-pipe was not secured as required and as represented in the application; and that it was agreed by and between the said agent and plaintiff, that before a fire was kept in the building a chimney should be erected and stove-pipe secured as represented in the application."

To this evidence the counsel for defendant objected, and the court rejected the evidence. This was the plaintiff's first bill.

The agent was further examined, and stated: "The survey, as to size of building, &c., and distance from other buildings, was made by me in my examination. I examined the building inside; I made a full examination. There was no chimney in the building, nor crock in the stove-pipe hole, — though I can't be positive as to the crock; my impression is, there was none."

On part of the plaintiff, the offer before made was renewed; and it was further proposed to prove "that though it was known alike to the agent and the insured that there was no chimney, yet the agent informed the insured that he would so insert it in the application, and all that would be needful on his part was, before using fires, to put in chimney and crocks as set forth in the application."

This evidence was rejected, and the plaintiff's second bill was sealed.

The court charged the jury as follows: —

"It is conceded in this case that there was in the building no chimney, and that the stove-pipe was not secured by crocks, and we charge you that the untrue representation as to the chimney and crocks is so clearly material to the character of the risk to be assumed, and so important for the insurer truly to understand before insuring, that it will defeat the policy without reference, on this account, to other evidence in the cause; and that your verdict should be for the defendants." *Verdict for defendants.*

Error was assigned to the rejection of the evidence referred to in the two bills of exceptions; and, 2dly, to the charge that the plaintiff was not entitled to recover.

WOODWARD, J. The familiar principle of law and morals, which requires of an agent that he be found faithful to his trust, is all-sufficient to justify the ruling of the court below.

Misrepresentation. — Statements of Company's Agent.

If it should be granted that this case is distinguishable from the *Susquehanna Insurance Company v. Perrine*, 7 W. & Ser. 348,¹ and that the agent acted as the representative of the company alone, and in no sort for the assured; what right, it may be asked, had the plaintiff to collude with him and obtain from the company an insurance upon false representations? The principal is bound by the acts of his agent whilst he acts within the scope of the deputed authority; but if, departing from that sphere, or continuing in it, he commits a fraud on his principal, a *particeps criminis* shall not profit by the fraud. A merchant's clerk colludes with a customer and discharges his account without payment, or on receipt of less than is due: does anybody imagine that the merchant is bound by such a settlement? Because he was the agent of his master and acting within the circle of his appropriate duties, a stranger or an innocent party might hold the master concluded, but not he who tempted to the fraud, shared in its perpetration, and sought its fruits. The principle is susceptible of a great variety of illustrations, but is so obviously sound as to stand in no need of them. Apply it to the facts before us.

The plaintiff, and R. C. Smith, as agent of the insurance company, came together to effect an insurance on the plaintiff's store; and the plaintiff accepts a policy which stipulates that a "false description by the insured of a building or its contents, or omitting to make known any fact or feature in the risk, which increases the hazard of the same, shall render absolutely void a policy issuing upon such description. Such survey, plan, or description shall be taken to be a warranty on the part of the assured." And again, at the foot of his application the plaintiff stipulated that "any misrepresentation in effecting this insurance shall be deemed not only a sufficient cause for cancelling my policy, but render the insurance void." That there was a misrepresentation in the description is not denied. The store was described as containing "one chimney, one stove, stove well secured, pipe passes through crock well secured;" whereas, there was no chimney and no crock whatever. The day after a fire was first kindled in the stove the store was burned down.

Now it is no answer to such facts to say that the survey and description, though signed by the plaintiff, was the act of the company's agent; for, —

¹ *Ante*, vol. 2, p. 339.

1. The plaintiff knew there was a false representation which increased the hazard, and he assumed the responsibility of it in the most explicit terms.

2. Obtaining a policy under a false pretence that there was a chimney and a well secured stove was a fraud on the company, and if practised by their own agent, it was at the instance, with the concurrence, and for the benefit of the plaintiff; and so long as the maxim endures that no man may take advantage of his own wrong, this plaintiff cannot recover on that policy.

The offer in the plaintiff's second bill was no better than the first; for the agreement, if made, was not communicated to the company, and was inconsistent with the paper signed by the plaintiff, and which he permitted the agent to communicate. A man makes a very precise written contract with the agent of a distant company which is communicated to them, and then seeks to recover on a secret parol agreement with the agent which he had no authority to make, and of which his principal never heard.

This is not according to the rule of good faith which should govern all bargains, and contracts of insurance above all others. We must confound the principles, both of law and morals, before such an attempt can be tolerated.

But beside, the agreement was, according to the plaintiff's own offer, that he was to put the chimney and crock in before lighting a fire in the stove, which the evidence shows he did not do. What good could it have done him to prove such an agreement? Even if a lawful and fair agreement, it could afford no ground of recovery because violated by him who asserts it.

Thus it is apparent the plaintiff has no ground to stand on, even if his proposition be conceded, that Smith was exclusively the company's agent and in no sense his. But it may be worth while to observe that this was a mutual insurance company, and that it is essential to the constitution of such a company that the party insured shall, *ipso facto*, be a member of the company. The act of incorporation declares that all persons who shall insure in this company shall become members during the period they are insured; and it gives them the right to vote, and a contingent interest in the dividends of the company. The fact that part of the capital is held as stock does not impair the mutual feature. Then the principle ruled in Perrine's case applies, and the in-

Double Insurance. — Evidence.

suror becomes responsible for the representations contained in the survey. The by-law that was in that case was wanting here; but its legal effect was fully supplied by the plaintiff's express warranty, whereby he took upon himself the consequences of "any misrepresentation in effecting this insurance." Through an agent of the company, of which the plaintiff became a member, he takes a policy, founded on representations for which he makes himself responsible by his direct engagement instead of his implied assent to a by-law, and thus he comes within the doctrine of *Perrine's* case, and the court was in no error in applying it to him.

But counsel insisted with great confidence that the ruling of this court in the recent case of *Bruner v. The Howard Insurance Company*, 11 Harris, 50, went the length of sustaining the plaintiff's action here.

The cases are not alike. That was not a mutual company. The agent who wrote out the description, instead of being limited to a mere reception of applications, was clothed with large powers — settled the terms of insurance, and countersigned and issued the policies without referring applications to the company. Under the circumstances in proof as to the execution of the papers, we held that the written survey was the act of the agent, and that the assured was not to be prejudiced by the omission of facts which he stated, but which the agent omitted to set down, because he deemed them immaterial. The conditions of the policy were interpreted with a view to the circumstances in proof, and the company was held liable.

As there is no resemblance in the features of the two cases, there is no logical connection between the principles of law appropriate to them.

Unable to perceive any error in the record before us, the judgment is

Affirmed.

*ROOTS & COE vs. THE CINCINNATI INSURANCE CO. SAME vs. THE WASHINGTON INSURANCE CO.*¹ (Superior Court, Cincinnati, Ohio, January Term, 1856.) *Double Insurance. — Evidence.*

In every case of double insurance, the risk must be on the same property; the liability also must be precisely the same. The insured may take policies upon different parts of the same building, or of the merchandise within the building, or upon different interests in both.

Parol testimony is admissible to establish the identity and extent of property covered by a policy of insurance.

¹ 1 Disney, 138.

Goods in Trust.

WILLIAM WATERS WATERS & BARNBABAS STEEL vs. THE
MONARCH FIRE AND LIFE ASSURANCE CO.¹

(Queen's Bench, England, Hilary Term, 1856.)

Goods in Trust.

Plaintiff made with defendants a policy of insurance against fire, in which plaintiff was described as a corn and flour factor; the policy was, amongst other things, on goods in his warehouses, and on "goods in trust or on commission therein." The defendants covenanted to make good any damage by fire to the property insured. The plaintiff was a wharfinger and warehouseman. He had in his warehouses goods belonging to his customers, which were deposited with him in that capacity, and on which he had a lien for the charges for cartage and warehouse rent, but no further interest of his own. No charge was made to the customers for insurance, nor were they informed of the existence of the policy. The plaintiff's warehouse was consumed by fire with all the goods in it. The defendants paid the value of the plaintiff's own goods, and the amount of his lien on his customers' goods; but refused to pay the value of the customers' interest in the value of the goods beyond the lien. *Held*, that the goods of the customers were in trust within the meaning of the policy; and that the plaintiff was entitled to recover the entire value.

THE declaration contained three counts, of which the first and third are alone material to the present case. The first and third counts were both on policies of insurance against fire on goods effected by the plaintiffs with the defendants. Pleas: To the first count, except as to £3,424 6s. 2d., that the plaintiffs were not, before or at the time of the loss in that count mentioned, interested in the property in the policy described and thereby intended to be insured, except as to £3,424 6s. 2d.; and payment into court of £3,424 6s. 2d. To the third count, except as to £367 10s. 5d., that the plaintiffs were not, before and at the time of the loss in that count mentioned, interested in the property in the policy described and thereby intended to be insured, except as to £367 10s. 5d.; and payment into court of £367 10s. 5d. The plaintiffs took the sums paid into court out of court, and joined issue on the other pleas.

On the trial, before Lord Campbell, C. J., at the Guildhall sittings after last Trinity term, a verdict was found for the plaintiffs on the first and third counts, with £643 10s. 7d. damages, subject to the opinion of the court on a case in substance as follows:—

The plaintiffs are flour merchants, warehousemen, and wharfingers, and carry on their business in Holland Street, Blackfriars Road. They do not receive goods on consignment or commission, nor sell on commission. The defendants are an insurance company

¹ 5 EL. & B. 870.

against fire. On the 7th March, 1851, the plaintiffs effected with the defendants a policy, being the policy on which the plaintiffs seek to recover under the first count. The material parts of the policy were as follows: "Whereas, Messrs. Waters & Steel, of Holland Street, Blackfriars, corn and flour factors, have paid the sum of £6 8s. to the directors of the Monarch Fire & Life Assurance Company, London, and have agreed to pay, or cause to be paid, the sum of £6 8s. yearly, on the 25th day of December, during the continuance of this policy of insurance from loss or damage by fire, not exceeding in each case the sum or sums hereinafter specified, upon the property herein described, in the place or places herein set forth and not elsewhere (unless allowed by indorsement previously made), on each article; viz: £3,000 on stock in trade and utensils in their warehouse, situate in Holland Street aforesaid; £400 on goods in trust or on commission therein; £100 on fixtures or fittings in the same; £100 on the steam-engine, boiler, and machinery in the engine house forming part of the said warehouse; £500 on live and dead stock, and utensils in stabling adjoining the above mentioned warehouse, not exceeding £40 on any one horse. The above buildings are all brick built. Memorandum: It is warranted that the said steam-engine be used for hoisting only. Now be it hereby known that, so long as the said assured shall duly pay or cause to be paid the premium aforesaid at the time aforesaid, and the directors of the said company for the time being shall accept the same, the funds and property of the said company according to the deed of settlement thereof (after satisfying all assurances granted by the company previously payable, and all other prior charges on such funds and property), shall be subject and liable to pay or make good to the said assured, his, her, or their executors, administrators, or assigns, all such damage and loss as shall happen by fire to the property hereinbefore mentioned, and hereby insured, not exceeding in each case respectively the sum or sums hereinbefore severally specified, not exceeding in the whole the sum of £4,100, according to the tenor of the conditions printed on the back of this policy." The only condition material to the point discussed was the 14th, which was as follows: "14. No policy issued by this company shall extend to cover fixtures, nor any goods or effects held in trust or on commission, nor any jewels, printed books, plate, watches, wearing apparel, trinkets, medals, curiosities,

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prints, paintings, china, glass, drawings, and sculpture, unless the same be expressly inserted in the policy."

The case then set out the policy on which the third count was framed. It was in the same form as the first. The subject matter of the insurance was described as "£2,000 on corn and flour, the property of the assured, or held by them in trust or on commission, on or in all or any of the public wharfs, quays, warehouses, sheds, vaults, cellars, yards, or crane-houses, situate within five miles of the Royal Exchange, London, including the flour and grain warehouses belonging to the Great Northern Railway Company, situated at King's Cross, subject to the condition of average annexed. Memorandum: This policy does not extend to protect goods deposited in any building or place in which any process of manufacture is carried on, or in any building or place communicating therewith." Nothing turned upon the condition of average. The other conditions indorsed on the policy were the same as those on the first policy. Both policies continued in force until the 16th day of February, 1855, when the plaintiffs' warehouse, situate in Holland Street, was destroyed by an accidental fire, with all the goods contained therein. At the time of the fire, the warehouse, besides large quantities of goods the property of the plaintiffs themselves, contained the following quantities of flour, the property of the plaintiffs' customers, which had been deposited with the plaintiffs as wharfingers and warehousemen for safe custody, namely: 422 sacks of flour for Heaver & Sayer; 25 sacks of corn for F. Heaver; 75 sacks of flour for J. R. Urry; 93 sacks of corn and flour for Welton; 80 sacks of flour for Bardgett; 60 quarters middlings for Cannon.

The usual course of the plaintiffs' business, as wharfingers and warehousemen, was to receive the flour deposited with them from lighters brought alongside their warehouse, to remove the sacks of flour from the lighters into the warehouse, to keep them until they received an order to deliver them from their customers, and then to cart them to the place where they were to be delivered to their customers. The plaintiffs' charge to their customers for landing, wharfage, and cartage, was 7d. a sack. The plaintiffs had no authority from their customers to insure (except so far as the conversation between the plaintiff Steel, and Mr. Urry, hereinafter mentioned, amounted to such an authority), and made no charge for insurance. The sacks of flour in question had been

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received by the plaintiffs from their customers according to their usual course of business as wharfingers. Urry, who had seventy-five sacks of flour in the warehouse at the time of the fire, stated at the trial that he had been a customer of the plaintiffs for several years ; that about two years ago he had a conversation with the plaintiff Steel, in the course of which Steel told him that the firm insured, by a separate policy, the goods of their customers which they had on their wharf, and that the whole of the stock on their wharf was insured. None of the other persons whose flour was deposited with the plaintiffs at the time of the fire had ever been informed that the plaintiffs had effected a policy of insurance which covered the flour deposited with them by their customers. The case then stated facts intended to raise some subordinate points which were not discussed. The sums paid into court by the defendants are sufficient to cover the amounts which the plaintiffs are entitled to receive in respect of goods the property of the plaintiffs themselves, and the plaintiffs' charge of 7*d.* a sack for landing, wharfage, and cartage, in respect of the goods deposited with them by their customers, and consumed by the fire.

The plaintiffs contend that their right to recover damages in respect of the goods of their customers deposited with them, and consumed by fire, is not limited to the amount of their charge for landing, wharfage, and cartage ; and that these goods were "goods in trust," and flour "held by" the assured "in trust," within the meaning of the two policies declared on, and that they are not prevented from recovering in respect of these goods by any want of interest. The defendants contend that the plaintiffs had not an insurable interest in the goods deposited with them by their customers and destroyed by the fire, beyond the amount of their own charges for landing, wharfage, and carting.

The questions for the opinion of the court are : whether, under the circumstances above stated, the plaintiffs are entitled to recover, and if they are, for what sum or sums.

The verdict and judgment to be entered as the court shall direct.

The court are to be at liberty to draw any inference of a fact which a jury might and ought to draw.

The pleadings are to be considered as a part of the case, and may be referred to by either party.

Mellish, for the plaintiffs.

Lush, contra. The value of the plaintiffs' own interest in the goods destroyed is covered by the payment into court; and they are not entitled to recover more. Bailees of goods are not responsible to the owners for a loss by fire; so that it cannot be properly said that they are accountable for the goods. In the policy they are described as factors, and it mentions goods on commission; but the goods the subject of this action were not on commission. [Lord CAMPBELL, C. J. In mercantile usage merchants are likely to have in their custody goods on commission. Those are insured by name, and also goods in trust. What goods are those which in mercantile usage merchants are likely to have, not being on commission, which can be called in trust, if the present are not?] It would seem that the description is not applicable to any goods in mercantile usage. [CROMPTON, J. In the Factors' Acts, Stat. 4 G. 4, c. 83; Stat. 6 G. 4, c. 94, and Stat. 5 & 6 Vict. c. 39, the phrase agents intrusted with goods is used, and is certainly confined to cases where the remedy is by a subpoena in chancery.] At all events the plaintiffs are entitled only to an indemnity; the sum they seek to recover is not theirs, and they did not insure at the request of the owners. [WIGHTMAN, J. But if the money is paid to the plaintiffs it will enure to the benefit of the owners of the goods.—Lord CAMPBELL, C. J. It was not intended to limit the policy to the personal interest of the plaintiffs; for in this, and in all other floating policies, the promise is, to make good the damage to the goods. Such a contract was valid at common law. *Dalby v. The India & London Life Assurance Company*, 15 Com. B. 365. What statute do you rely upon as making it illegal?] It must be admitted that there is no statute applicable to this case.

Mellish was not called upon to reply.

Lord CAMPBELL, C. J. After hearing the argument, I have come to the conclusion that the plaintiffs are entitled to judgment. The first question is, whether upon the construction of the contract these goods were intended to be covered by the policy. I think in either policy the description is such as to include them. What is meant in those policies by the words "goods in trust?" I think that means goods with which the assured were intrusted, not goods held in trust in the strict technical sense, so held that there was only an equitable obligation

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on the assured, enforceable by a subpoena in chancery, but goods with which they were intrusted in the ordinary sense of the word. They were so intrusted with the goods deposited on their wharfs; I cannot doubt the policy was intended to protect such goods, and it would be very inconvenient if wharfingers could not protect such goods by a floating policy. Then, this being the meaning of the policy, is there anything illegal in it? It cannot now be disputed that it would be legal at common law; and Mr. Lush properly admits that it is not prohibited by the terms of any statute. And I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there is such a policy. It would be most inconvenient in business if a wharfinger could not, at his own cost, keep up a floating policy for the benefit of all those who might become his customers. The last point that arises is, to what extent does the policy protect those goods? The defendants say it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good "all such damage and loss as may happen by fire to the property hereinbefore mentioned." That is a valid contract; and as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them.

COLERIDGE, J., was absent.

WIGHTMAN, J. There are two questions. The first, whether the goods destroyed were covered at all by the policies. The policies are on various descriptions of goods, and, amongst others, on goods "in trust." It seems clear to me that the goods in question were in trust. The plaintiffs are warehousemen and wharfingers, and the goods were in their warehouse; they had a lien on them, subject to which they were accountable to the owners who had intrusted them with the goods. So the goods lost were goods in trust. Then comes the question, can the plaintiffs recover their value? It seems to me that they may, unless there be something making it illegal to insure more than the plaintiffs' own interest. Mr. Lush does not contend that any statute applies. It has been decided that, if no statute applies, a person

Agent. — Concealment. — Effect of.

insured may recover the amount contracted for ; and, that being so, I think the plaintiffs entitled to recover the whole value.

CROMPTON, J. I cannot entertain the least doubt that in these policies the words "in trust" are used without any reference to a subpoena in chancery. The parties meant to insure those goods with which the plaintiffs were intrusted, and in every part of which they had an interest, both in respect of their lien, and in respect of their responsibility to their bailors. What the surplus, after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined ; but they were persons interested in every particle of the goods.

Judgment for the plaintiffs.

BEBEE vs. HARTFORD COUNTY MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Connecticut, March Term, 1856.)

Agent. — Concealment. — Effect of.

An insurance agent is not necessarily the agent of the applicant in making out the application, though instructed by the company to consider himself as such in so doing.

The fact that buildings have been on fire a number of times shortly before the policy on them was issued should be communicated to the insurers. But it is sufficient that the fact was made known to the company's agent, though the assured may not have gone into details in speaking of the fires.

On a motion for a new trial on the ground that the verdict is against evidence, it is not material that the precise number of such fires was not stated, especially if this was owing to the agent's lack of interest in the matter and his neglect to make inquiry.

Barbour & E. Perkins, for defendants.

McCurdy & Wait, for the plaintiff.

The facts sufficiently appear in the opinion of the court delivered by

HINMAN, J. This was an action on a policy of insurance against fire, in which the plaintiff recovered, and the defendants now move for a new trial, on the ground of errors in the rulings and charge of the court, and also on the ground that the verdict is against the weight of evidence in the case.

The first point of law relates to the charge in respect to the agency of Lay. Lay was the local agent of the defendants at Lyme, for the purpose of receiving applications for insurance, and for other purposes, and he testified that the officers of the company had told him that he must consider himself more the agent of the insured than of the company, and as it was an important

¹ 25 Conn. 51.

inquiry in the case, whether the company was fairly apprised of certain facts material to the risk, the defendants requested the court to charge the jury that if the plaintiff did communicate those facts to Lay, yet if he neglected to communicate them to the officers of the company, and the policy was issued by those officers without a knowledge of them, then the policy ought to be deemed void. This claim was very properly rejected; and the jury were told that if Lay was the agent of the company, any neglect on his part was not chargeable to the plaintiff, unless he was also his agent. Of course the company could not make their agent also the agent of the insured, unless the insured chose to recognize him as his agent; and however desirous the defendants may have been that their agent should conduct fairly with applicants for insurance, most applicants, probably, would prefer for their own agent some one not connected with the company.

We have no reason to doubt that it was the object of the company that Lay should conduct fairly and honorably towards all applicants for insurance; and for the purpose of impressing his duty upon him, it was very proper for the president of the company to say to him that he must consider himself the agent of the insured as well as the agent of the company. But to attempt to dignify a caution of this sort into a real agency for the insured is wholly unjustifiable both in law and fact, and is rather calculated to change the honorable character of the caution into a snare for the unsuspecting.

Again, the charge is claimed to be erroneous in respect to the disclosure to the agent of certain unusual circumstances material to the risk. Several fires had occurred in an unusual manner, in the plaintiff's house, just previous to the application for insurance, and it was claimed that, in disclosing this circumstance to the agent, the plaintiff did not go sufficiently into detail, and did not, therefore, give a full and fair disclosure.

Undoubtedly, the insurer is understood to take the risk upon the supposition that nothing material exists that is not fully disclosed. And the fact that his buildings had been on fire a number of times shortly before the insurance was effected was certainly a very material circumstance, which, if not disclosed would have rendered the policy void. Such an unusual occurrence tended to a suspicion that incendiaries had attempted and might again attempt to fire his buildings; and this concealment — and

silence on such a subject would amount to concealment — would operate as a fraud upon the insurer, and render the policy void. Pars. Mer. Law, 524; *Curry v. Commonwealth Ins. Co.* 10 Pick. 535; ¹ *Clark v. Manufacturers' Ins. Co.* 8 How. U. S. 235.²

We have no intention of relaxing, in the least, the rule which requires of the insured the most unreserved frankness on such a subject as this. But we think the charge required this of the plaintiff in this case. The insured is not bound to force his knowledge upon the insurer. In many cases he could not do it if he tried. "He need not," says Lord Mansfield, "mention what the underwriter ought to know; what he takes on himself the knowledge of, or what he waives being informed of. *Carter v. Boehm*, 3 Burr. 1905.

Now it is apparent, from the evidence, that the alarm of Bebee on account of these fires was well understood by the agent. When he first applied for insurance, he told the agent that he had had some fires in his wood-house and house, and wanted his buildings insured; and when told that he must first bring the dimensions of his buildings, he replied that he would come the next day. The agent answered immediately, "You'll come while the fire is hot." And when he did come with the dimensions, prepared to effect the insurance, he again told the agent he had had fires in his wood-house and house; that the first fire was discovered in a barrel of shavings in the wood-house, and how it was put out. The agent interrupted him to ask where the fire was in the main part of the house, and he told him in the bed in the west front chamber. And when asked how much the bed was damaged, he told him it was about spoiled. Then the agent inquired if he had any enemy, or any suspicion of any one; and he told him he could not tell anything about it, only that these fires had occurred; he could not tell how; it was all a mystery. To this the agent replied, that he had frequently been afraid his house would get burned, for fires frequently occurred, and no one could tell how they occurred. Then they had a conversation about slow matches, and as to who had been at the house, and whether any one had been there that the plaintiff suspected of setting fire to the premises.

Now, as applicable to these facts, the jury were instructed that any suppression of material facts, though by mistake and with-

¹ *Ante*, vol. 1, p. 333.

² *Ante*, vol. 2, p. 535, note.

out actual fraud, would vitiate the policy, whether the result of stupidity, mistake, or inadvertence, because it operates as a fraud upon the insurer. But that the insured was not bound to go into details as minutely as on the witness stand, but is bound to state fairly the substantial facts material to the risk. And in commenting on the facts, the court told the jury that much in respect to details which ought to be communicated would depend on the conduct of the insurer; that a party could not be expected to go into details about which the insurer manifested no interest, and made no inquiry; and in another part of the charge it is intimated that it was sufficient to disclose such facts as would occur to an honest man of ordinary intelligence as being material to the risk, though he may omit to go into all the details.

On a point quite analogous to this, Lord Mansfield remarked that the underwriter, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either, signed this policy without asking a question. By so doing he took the knowledge of the state of the place upon himself. With some slight variations, to adapt this language to the circumstances of the case under consideration, it seems almost as applicable to it as to the case of *Carter v. Boehm*. The material difference in the two cases is, that instead of being told nothing, the agent here was told all which occurred to the plaintiff as material to the risk, and he only omitted to go into a full detail of all the circumstances, because the agent not only expressed no desire for more full information, but by his questions to the plaintiff, turned his attention from the subject to the point whether he suspected any one, and, if so, whom, as having caused the fires. Is it not correct then to say, on such a question, that, in respect to details, much must depend on the conduct of the insurer? And if the plaintiff, under the circumstances, disclosed all that occurred to him, and all that would be likely to occur to an honest man of ordinary intelligence, is it not enough?

It may be that the agent did not suppose there was so much occasion for alarm as Bebee appeared to feel. But so long as he did not obtain this erroneous impression by means of anything done by Bebee to mislead him, the consequences of his error cannot be charged to the plaintiff.

Assignee. — Other Insurance.

On the motion for a new trial, on the ground that the verdict is against the weight of the evidence, but little need be said. Indeed, much that has been already said is, perhaps, as applicable to this part of the case as to the question of law arising under the charge. It is true, the precise number of fires that had occurred on the premises was not stated to the agent; but this seems to have been rather the result of the agent's want of interest in the matter, and of his neglect to make inquiry, than of any fault on the part of Bebee. And taking the whole evidence together, we think there is no reason to believe there was any intentional concealment on his part.

We will only say, therefore, that considering the well known reluctance of the court to interfere with the verdicts of juries on questions of fact, we are not satisfied that there is even a plausible ground for such interference in the present case.

We do not, therefore, advise a new trial on any ground.

In this opinion the other judges, ELLSWORTH and STORRS, concurred.

New trial not granted.

EDWARD HALE vs. MECHANICS' MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, March Term, 1856.)

Assignee. — Other Insurance.

One to whom has been assigned, with the consent of the insurers, all the interest of him to whom a policy is payable in case of loss, is not the assignee of the policy, and is affected by any subsequent acts of the assured.

A policy issued by a mutual fire insurance company, whose by-laws provide that any insurance subsequently obtained without the consent in writing of their president shall avoid the policy, and that the by-laws shall in no case be altered except by a vote of two thirds of the stockholders or directors, is avoided by a subsequent insurance obtained with the mere verbal consent of the president.

ACTION OF CONTRACT on a policy of insurance, made by a mutual fire insurance company to Thaddeus Stone and Calvin Perry, upon their buildings in Somerville, "in case of loss payable to S. S. Jackson," who was a mortgagee of the property, and who had since assigned to the plaintiff, with the consent of the defendants, all his interest in the policy. Answer, a subsequent insurance, obtained without the consent in writing of the defendants' president.

Among the provisions of the by-laws of the defendants to

¹ 6 Gray, 169.

Assignee. — Other Insurance.

“ the conditions and limitations expressed in ” which the policy was made subject were the following :—

“ Art. 7. The president shall attend daily at the company's office ; shall receive all applications for insurance ; shall examine alone, or jointly with any director, all the buildings or other property, in the city of Boston, which may be proposed to be insured, and fix the sum to be taken thereon, and the rates of insurance ; and adjust and pay all losses, unless in cases where the opinion of the board of directors is required. He shall exhibit to the directors, at each monthly meeting, a full statement of the affairs of the company, and cause the same to be recorded. He may submit any matter to the board of directors and ask their opinion thereon, and take the same by vote.”

“ Art. 15. All policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues ; and when a subsequent insurance shall be made by any other company, or by any person, on property insured at this office, without the consent of the president, in writing, and according to the terms in such consent expressed, it shall annul the said policy ; and the assured shall be entitled to such return of premium and deposit as is provided in article 23d.”

“ Art. 26. These articles shall in no case be altered, unless the intended alteration shall have been proposed at a meeting of the company previous to the one at which it is to be acted on, and mentioned in the public notice of such meeting ; and unless it shall be voted for by two thirds of all the members present at that meeting : Provided, however, if any alteration shall be deemed necessary before the next annual meeting, it may be made by the vote of two thirds of the directors, upon the same condition of notice as is provided in this article concerning the company.”

At the trial, before Bigelow, J., the plaintiff admitted that Stone and Perry, after the assignment by Jackson to the plaintiffs, obtained other insurance on the property ; but introduced evidence tending to show that the defendants, by their president and secretary, consented to the procuring of a subsequent insurance by Stone and Perry before the second policy was made ; that the subsequent insurance was verbally notified to the defendants, and verbally assented to by their president and secretary,

who required only that the second policy should be brought to the office as soon as possible for the purpose of having such consent indorsed ; that Stone and Perry promised that it should be done, but did not have time to procure it before the fire ; and that the plaintiff, after the fire, and at the time of demanding payment of the loss, made a demand upon the defendants to have such consent indorsed on that policy. The defendants introduced evidence tending to show that no such consent was given. No written consent was proved or claimed.

The jury, upon the question being submitted to them, found specially that the defendants' president had verbally waived the provision of the fifteenth article of their by-laws, and verbally assented to the subsequent insurance. And the judge reserved for the whole court the question whether, upon the foregoing facts, and the special finding of the jury, the plaintiff was entitled to recover.

E. F. Hodges & L. Saltonstall, for the plaintiff.

G. W. Phillips, for the defendants.

BIGELOW, J. The nature and extent of the interest which the plaintiff acquired in the policy declared on, by virtue of the clause making the amount due, "in case of loss, payable to S. S. Jackson," and the subsequent transfer of that interest, with the assent of the defendants, by Jackson to the plaintiff, are fully stated and explained in the recent case of *Fogg v. Middlesex Mutual Fire Ins. Co.* 10 Cush. 346.¹ According to the principles there laid down, with the soundness of which we are entirely satisfied, the legal effect of this clause is, that the defendants agree that the plaintiff shall recover whatever the persons originally insured by the policy may be entitled to receive in case of loss ; but it is only a contingent order or assignment of what may become due under the contract, and not an absolute transfer by virtue of which the plaintiff acquired the full rights of an assignee of a *chose in action*. The original contract with Stone and Perry still subsisted. It was their interest in the premises which was insured. The plaintiff stands and must claim in their right as the party insured, and not in his own. It is only what they have a right to receive under the contract that is payable to him. If, therefore, by reason of any act of theirs, before the loss happened, the policy was rendered void, their right to recover is destroyed, and there being no loss under the policy for which the defendants

¹ *Ante*, vol. 3, p. 419.

are liable, the plaintiff cannot recover. The contingency, on which his claim against the defendants was to arise, has not occurred.

Such being the rights of the parties under the contract, it is clear, upon the facts in this case, that the policy was annulled under the fifteenth article of the by-laws, by reason of the subsequent insurance procured by Stone and Perry on the property, without the assent of the president of the corporation in writing; unless the waiver of such written assent by the president, and his verbal consent to such subsequent insurance, as found by the jury, operate to set aside this provision in the by-laws as to this particular policy, and render the contract valid, notwithstanding by its express terms, as well as by the clause in the by-laws, it would be otherwise void. But the difficulty in maintaining the plaintiff's position on this part of the case is, not only that it attempts to substitute for the written agreement of the parties a verbal contract, but that there is an entire absence of any authority on the part of the president to make such waiver, or give such verbal assent. He was an agent, with powers strictly limited and defined, and could not act so as to bind the defendants beyond the scope of his authority. Story on Agency, §§ 127, 133. *Salem Bank v. Gloucester Bank*, 17 Mass. 29. By article fifteenth of the by-laws, his power to assent to a subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over insurance, the corporation might well require that any assent on their part to further insurance on property insured by them should be given by the deliberate and well considered act of their president in writing, and not be left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case, and, as the evidence shows, were fully known to the assured. *Worcester Bank v. Hartford Fire Ins. Co.* 11 Cush. 265.¹ *Lee v. Howard Fire Ins. Co.* 3 Gray, 589, 594.²

Nor is this the only restriction on the power of the president. He had no authority to waive any by-law of this corporation. By Rev. Sts. c. 37, § 24, and c. 44, § 1, the corporation alone had power to establish by-laws "for their own government, and for the due and orderly conducting of their affairs." By article

¹ *Ante*, vol. 3, p. 589.

² *Ib.* p. 733.

By-law. — Place of Suit.

twenty-sixth, it is expressly provided that the by-laws "shall in no case be altered," unless previous notice of such intended alteration be given as therein prescribed, and "it shall be voted for by two thirds of all the members present at that meeting." If the argument of the plaintiff should be carried out to its legitimate result, it would give to the president the right, in any case, to suspend or change the by-laws, by his verbal act, and at his pleasure. This he clearly had no power to do.

We are, therefore, of opinion that the finding of the jury does not render the policy valid; but that it was annulled by the subsequent insurance obtained by the assured without the written assent of the president.

Judgment for the defendants.

EPHRAIM NUTE vs. HAMILTON MUTUAL INSURANCE CO.

(Supreme Court, Massachusetts, March Term, 1856.)

By-law. — Place of Suit.

A plaintiff who, in a declaration against an insurance company on a policy issued by them by a name other than their own, "subject to the provisions, conditions, and limitation of the by-laws of said company," avers that the policy was so issued (which is admitted by the defendants in their answer), is bound by the valid provisions of the charter and by-laws of the defendants.

A provision of a by-law of a mutual fire insurance company, to which their policies are expressed to be subject, that any suit on a policy shall be brought in the county where the company are established, is not binding on the assured.

SHAW, C. J. The defence to this action, on a policy entered into by a mutual fire insurance company, is, that by the terms of the policy the contract was that the suit should be brought at a proper court in the county of Essex, within four months after the determination by the directors that nothing was due to the plaintiff upon the loss claimed. By a comparison of dates it appears that this suit was brought within four months; but it was brought in the county of Suffolk, and not in the county of Essex; and on that ground the court of common pleas held that the action could not be maintained. The correctness of that ruling is the sole question now presented to this court.

In cases recently determined, it has been held that a stipulation in a policy of insurance, or in a by-law constituting in legal effect part of such policy, by way of condition to their liability, that no recovery shall be had unless a suit is commenced within a

certain time limited, was a valid condition, and that, unless complied with, the plaintiffs were not entitled to recover. *Gray v. Hartford Fire Ins. Co.* 1 Blatchf. C. C. 380; *Wilson v. Aetna Ins. Co.* 27 Verm. 99. In this case it is strenuously insisted that a stipulation, that an action shall be brought in a particular county, where by law it may be brought, is strictly analogous, and ought to be enforced as a condition precedent by a court which, without such stipulation and condition, would clearly have jurisdiction of the subject matter and of the parties.

A preliminary objection is taken here, in the argument for the plaintiff, that the plaintiff is not bound by the by-laws annexed to the policy, because they are not in fact, and do not purport to be the by-laws of the Hamilton Insurance Company, but of another corporation denominated the Manufacturers' Insurance Company. This is founded on the peculiar and remarkable form of this policy. The policy appears throughout to be the act of the Manufacturers' Insurance Company, which would seem to be another corporation; and the name of the Hamilton Company nowhere appears in the policy, except the single word "Hamilton" on a symbolical device on the face of the policy in the form of a coat of arms. And it is true that, on the face of the policy, the terms "by-laws of said company" would appear to mean those of the Manufacturers' Company; and so the term "said company" is used throughout the instrument.

But the decisive answer seems to be, that unless the Hamilton Company are the corporation with whom the plaintiff contracted, he has no cause of action, and the argument for the plaintiff would state his case out of court. The plaintiff, in his declaration, avers that the defendants, by the name of the Manufacturers' Insurance Company, made the policy. If so, they have simply adopted another name as the designation of the Hamilton Company; and then it follows, that the "said company" means the company contracting, and "their by-laws" are those of the Hamilton Company, in reference to and conformity with which the contract on both sides was made. The Hamilton Company admit this policy to be their contract, but deny the breach; and this is the issue with them, in which the plaintiff joins.

The cause of this peculiar form of policy, on taking the policy and by-laws together, appears plainly enough; the by-laws direct that the risks of the Hamilton Company shall be divided into

four classes, to be called "the Farmers'," "the Citizens'," "the Merchants'," and "the Manufacturers' Insurance Company"; so that in effect this is the policy of the Hamilton Company, insuring the plaintiff's property in that class of risks called the Manufacturers' Insurance Company; and the name used in the policy does not designate a corporation, but a class of risks in the Hamilton Company. It seems to be an inconvenient and awkward arrangement, by which, in the form of their contracts, they renounce their own corporate name, usually the very test of corporate identity, and adopt what on the face of it would appear to be the name of another corporation. But when the plaintiff alleges that the Hamilton Company did thus make this contract by such name, that the policy annexed is their policy, regardless of the name; and the defendants, being served with process, come into court and admit it, and tender an issue; and the plaintiff takes issue with them on the question of breach and damages; no question is presented to this court on the subject. It follows conclusively that the policy, being the act and contract of the Hamilton Company, the charter and by-laws of "the said company," referred to in the policy, are their charter and by-laws, and are those stated at length on the back of said policy.

It is the Hamilton Mutual Insurance Company, of which the plaintiff, by force of his application and by the acceptance of his policy, became a member, with the usual rights and powers of a corporator. By this fact, as well as by the definite reference in the policy itself, we think the plaintiff as well as the defendants were bound; and that their rules are to be regarded in construing the policy, as if they were embodied in it. The clause in the policy is, that the company do promise and agree to insure him against loss or damage by fire, "subject to the provisions, conditions, and limitations of the charter and by-laws of said company."

The provision on which this defence depends is found in article 22d of the by-laws. After providing that notice of loss shall be given, and that thereupon the directors shall proceed to determine whether any loss has occurred for which the company are liable, and, if so, ascertain the amount, it provides that, if the assured do not acquiesce in such determination, as to the liability or the extent of it, and both parties do not agree to refer, as they may, "the assured may, within four months after such determination, but not after that time, bring an action at law against the

company for the loss claimed, *which action shall be brought at a proper court in the county of Essex.*"

Here are no negative words, and, strictly speaking, no stipulation that the action shall not be brought elsewhere, unless they are implied by the term "shall be brought" in *Essex*. These words were not necessary to give the assured a remedy, because without them it is conceded that they would have a remedy at common law, as in all cases of breach of contract, for which no stipulation is necessary. In this respect the case differs essentially from that of *Boynton v. Middlesex Mutual Fire Ins. Co.* 4 Met. 212.¹ There it was provided by the act of incorporation, which has all the force and effect of a general law, that in case the directors should find the company liable and award a certain sum, and the assured should not acquiesce, but be dissatisfied with the amount, the action should be brought in the county of Middlesex. In such case, the action to be brought was in the nature of an appeal from the decision of the directors, as in a case of allowance or disallowance of a debt by commissioners of insolvency on the estates of deceased persons, or, under the insolvent laws, in the case of a claim against a living insolvent debtor; and the legislature might rightfully regulate the time and mode of entering and prosecuting such appeal; and as the law gave a new and specific right in such case of dissatisfaction with the amount awarded, and pointed out a specific remedy, by a well known rule of law, the specific remedy must be pursued. But it was also held, in that case, that as the directors had determined that the company were not liable, and had awarded nothing, it was not the specific case of the statute, and that the assured were remitted to their remedy at law, by action in either of the counties where, by general law, it might be brought.

Upon the particular question here presented, the court are of opinion that there is an obvious distinction between a stipulation by contract as to the time when a right of action shall accrue and when it shall cease, on the one hand; and as to the forum before which, and the proceedings by which an action shall be commenced and prosecuted. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; the other is a stipulation concerning the remedy, which is created and regulated by law. Perhaps it would not be easy or practicable to draw a line of dis-

¹ *Ante*, vol. 2, p. 181.

inction, precise and accurate enough to govern all these classes of cases, because the cases run so nearly into each other; but we think the general distinction is obvious.

The time within which money shall be paid, land conveyed, a debt released, and the like, are all matters of contract, and depend on the will and act of the parties; but in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The stipulation that a contracting party shall not be liable to pay money, or perform any other collateral act, before a certain time, is a regulation of the right, too familiar to require illustration; a stipulation, that his obligation shall cease if payment or other performance is not demanded before a certain time, seems equally a matter affecting the right. A stipulation, that an action shall not be brought after a certain day or the happening of a certain event, although, in words, it may seem to be a contract respecting the remedy, yet it is so in words only; in legal effect it is a stipulation that a right shall cease and determine if not pursued in a particular way within a limited time, and then it is a fit subject for contract, affecting the right created by it.

But the remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract.

Suppose it were stipulated in an ordinary contract, that in case of breach no action shall be brought; or that the party in default shall be liable in equity only and not at law, or the reverse; that in any suit to be commenced no property shall be attached on meane process or seized on execution for the satisfaction of a judgment, or that the party shall never be liable to arrest; that, in any suit to be brought on such contract, the party sued will confess judgment, or will waive a trial by jury, or consent that the report of an auditor appointed under the statute shall be final, and judgment be rendered upon it, or that the parties may be witnesses, or, as the law now stands, that the plaintiff will not offer himself as a witness; that when sued on the contract, the defendant will not plead the statute of limitations, or a discharge in insolvency; and many others might be enumerated: is it not obvious that, although in a certain sense these are rights or privileges which the party, in the proper time and place, may

give or waive, yet a compliance with them cannot be annexed to the contract, cannot be taken notice of and enforced by the court or tribunal before which the remedy is sought, and cannot therefore be relied on by way of defence to the suit brought on the breach of such contract?

We do not mean to say that many of these are stipulations which it would be unlawful to make, or void in their creation, if made on good consideration, or that they do not become executory contracts upon which an action would lie, and upon which damages, if any were sustained, might be recovered. Still they would not be conditions annexed to the contract, to defeat it if not complied with, and so to be used by way of defence to an action upon it.

This seems to have been the distinction taken in the latest English case cited at the bar. *Livingston v. Ralli*, 5 El. & Bl. 132. The point decided there was, that, though an agreement to submit a difference arising on a contract to arbitration is not a good plea in bar to an action on such contract, the breach of it may be a good ground of action.

It is true that a covenant never to sue after the breach of a contract, though a stipulation respecting the remedy to be pursued, may be allowed as a bar to an action upon it; but this is upon the ground that a covenant never to sue is, in legal effect, equivalent to a release, and, to avoid circuity of action, may be pleaded by way of release.

The distinction between that which is matter of contract and may be a proper subject of consideration, to be applied in expounding it, making it what it is, and to be applied to the construction of it, whenever and wherever it is to be enforced; and that which is matter of remedy regulated by law, the law of the place where the remedy is sought, is recognized and stated in an early case of our own. *Pearsall v. Dwight*, 2 Mass. 84.

Supposing, then, the rule to be well settled by principle and authority, that a stipulation is valid which provides that no action shall be brought unless commenced within a specified time, which appears to us to be equivalent to a condition in the contract, that all liability shall cease and determine unless the claim upon it is made by an action within the time limited, and attaches to the contract itself, still, in our opinion, there is not such an analogy between that and the stipulation as to the

By-law. — Place of Suit.

forum in which a suit shall be commenced, that the one can be taken as an authority for the other. Upon the grounds stated, we think the two cases stand upon very different reasons.

Supposing the words in the by-law, "which action shall be brought at a proper court in the county of Essex," be deemed equivalent to a negative provision, that no action shall be brought in any other county, — of which we give no opinion, — we are not aware of any authority bearing upon the question that such stipulation or condition can be regarded as a condition of the contract, or that a non-compliance with it will be a defence to the action before a court having jurisdiction of the subject matter and of the parties.

In recurring to the full and elaborate written argument of the defendant's counsel, we find no authority upon this part of the case. In referring to the case of *Boynton v. Middlesex Mutual Fire Ins. Co.* 4 Met. 212, which we have already alluded to, it is urged, on the authority of *Holden v. James*, 11 Mass. 396, in which a special statute of limitations (which was a strictly private act) was held unconstitutional, that the ground on which the court decided must have been the contract of the parties, and not the law of the land. But the court, in 4 Met. 215, cite Rev. Sts. c. 2, § 3, directing that all acts of corporations shall be deemed public acts. If so, they are the law of the land, controlling, and, as far as they go, repealing other public acts. Whether this ground was correct or not, it was that on which the court decided, and the case therefore is not an authority for giving a like effect to matters of mere contract.

In a certain sense all persons are said to be parties, and assent to the laws of the government to which they owe allegiance; such laws are binding on them, and enter into and make part of every agreement which such persons make. But we are speaking of the known and familiar distinction between contracts between parties *in pais*, which are binding on them because they have so agreed; and duties created by law, which are binding on parties because they are law, and do not derive their force from contract.

A party is barred by the statute of limitations, not because he has so agreed, but because such is the positive law, the *lex fori*, the aid of which he is seeking to obtain his rights. So of arrest of the person, sequestration of goods, levy on lands, and the like;

the plaintiff does not derive his right to the use of these means from the agreement of the contractor, but from the positive law which gives him the remedy, and the means of obtaining satisfaction, incident thereto.

Most of the cases cited, both English and American, are conditions annexed to the contract: such as bringing the action within a certain time, procuring certificates of church-wardens, magistrates, or others, practising no fraud, making seasonable and true representations of loss, and the like; as such, they are modifications of the contract, not of the remedy.

We place no great reliance upon considerations of public policy, though, as far as they go, we think they are opposed to the admission of such a defence. The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from the personal, social, or political standing of parties in one or another county. It might happen that a mutual insurance company, in which every holder of a policy is a member, and of course interested, would embrace so large a part of the men of property and business in the county, that it would be difficult to find an impartial and intelligent jury. But, as already remarked, these considerations are not of much weight. The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies.

The law fixing the rate of interest is cited as an illustration of the point, that, though the law has fixed the rate of interest, yet parties may vary it by contract, and take a less interest. Undoubtedly they may. But take the whole statute together; what are its objects? Manifestly two: first, to fix a rate of interest where the parties have made no agreement as to the rate; secondly, to fix a rate beyond which a creditor cannot take or

House of Ill-fame. — Adjacent Buildings. — Unanswered Questions, etc.

receive interest with impunity. The contract is not void, as formerly; but the creditor suffers a penalty for it. These objects are effectually accomplished by the provisions of the statute, and no more. Rev. Sta. c. 35, § 2; St. 1846, c. 199. Of course it is not repugnant to these provisions for parties to fix a rate of interest by agreement, within this limit. This has no analogy to the present question.

There being no authority upon which to determine the case, it must be decided upon principle. The question is not without difficulty, but, upon the best consideration the court have been able to give it, they are of opinion that it is not a good defence to this action that it was brought in the county of Suffolk, and not in the county of Essex; and therefore that the exceptions must be sustained, the verdict set aside, and a new trial granted.

MARTIN L. HALL vs. PEOPLE'S MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, March Term, 1856.)

House of Ill-fame. — Adjacent Buildings. — Unanswered Questions. — Place of Suit.

A policy of insurance upon a hotel, described in the application (which is expressly made a part of the policy and warranty on the part of the assured) as occupied as such by a tenant, and which is in fact leased and apparently used as a hotel at the time of obtaining the insurance, is not avoided by its being then used by the tenant, without the knowledge or consent of the assured, as a house of ill-fame.

In an application, which was expressly made a part of the policy and warranty on the part of the assured, the applicant, in answer to a request to "state the relative situation as to other buildings," stated the distances, being respectively four and nineteen feet, of the two nearest buildings, and expressly agreed that the application was "a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant." Held, that the failure to state the direction of the two nearest buildings, or to disclose other buildings a few feet farther off, not known to the applicant, nor to his agent who made the application, did not avoid the policy.

The issuing of a policy upon an application, one interrogatory in which is unanswered, is a waiver of that defect.

A condition of insurance, to which a stock policy is made subject, that no suit shall be brought thereon unless in the county where the insurance company are established, is not binding on the assured.

ACTION OF CONTRACT by an inhabitant of this county against a mutual fire insurance company established at Worcester by St. 1847, c. 115, and authorized by St. 1850, c. 225, to "make insurance otherwise than on the mutual principle," upon a stock policy dated November 24th, 1852, whereby they insured the

¹ 6 Gray, 185.

plaintiff for one year "two thousand dollars, to wit, \$1,500 on his Exchange Hotel building, \$500 on stable and shed adjoining, situated No. 248 Purchase Street, in New Bedford, Massachusetts." On the face of the policy were these provisions: "This insurance is predicated upon a survey filed in this office as No. 2298, which survey is made a part of this policy." And it is moreover declared, that this policy is made and accepted in reference to the conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." Among said conditions for insurance were the following: —

"1. Applications for insurance should be in writing, and specify the construction and materials of the building to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings; and their construction and materials."

"4. A false description by the assured, of a building insured or of its contents, or, in a valued policy, an overvaluation, shall render absolutely void a policy issuing upon such description or valuation."

"14. It is furthermore hereby expressly provided that no suit or action of any kind against said company, for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of four months next after any loss or damage shall occur; nor unless said court be held in the county of Worcester; and in case any such suit or action shall be commenced against said company after the expiration of four months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

"18. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured."

The "stock, application, and survey" filed in the defendants' office, numbered 2298, was for insurance "on the property speci-

fied, to wit, on Exchange Hotel building, \$1,500 ; on stable and shed adjoining, \$500 ;" and in it, "the applicant makes the following statements, and gives the following answers to interrogatories here put relating to the risk : 1. State the character and kind of the property to be insured." *Answer.* "Hotel, as above." 2. "Where is it situated?" *Answer.* "No. 248 Purchase Street, New Bedford, Massachusetts." "4. For what purpose is the building occupied and by whom?" *Answer.* "As a hotel, by Mr. Holmes." "5. State the relative situation as to other buildings." *Answer.* "Dwelling about four feet distant one side. About fifteen feet to small dwelling and storehouse." "7. Is the building to be insured exposed by anything more hazardous than the risk herein described? If so, state what, if within eighty feet." This interrogatory and several on other matters, were not answered. The only other provision material to this case was the following statement in the printed clause of the application, immediately preceding the plaintiff's signature : "And the said applicant hereby covenants and agrees with said company, that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant." The application was dated "Boston, November 18. 1852."

Trial at the November term, 1854, before *Thomas, J.*, who made a report thereof, of which the application and policy were made parts, and the remainder of which was as follows : —

"The execution of the policy was admitted, and there was no question made about the loss, or proof of the loss. The defence was misrepresentation as to the use to which the insured buildings were put ; and also as to the relative position of the other buildings adjoining and in the neighborhood. The defendants also contended that the suit was wrongfully brought in the county of Suffolk, but by the terms of the policy should have been brought in the county of Worcester.

"By the original application and survey it appears that, at the time of obtaining insurance, the plaintiff stated the house insured to be occupied by John Holmes, as a hotel. The defendants contended that this was not true, but that it was kept as a house of ill-fame ; and they offered evidence tending to show that such was the fact. The defendants contended that, if this were so, the

policy would be invalid, whether the plaintiff knew the fact that the house was so kept or not ; that the declaration in the application was a part of the policy, and constituted a warranty that the house was kept as a hotel ; that, by the fourth condition of the policy, a false description would render it void.

“It further appeared that the mercantile firm, of which the plaintiff had formerly been a member, received a bond for conveyance of the said insured estate, in payment of a debt ; that said bond, in the division of the assets of said firm, had been set off to the plaintiff, and that, the terms of the bond having been complied with, said estate was conveyed to the plaintiff in 1851 ; that he had heretofore leased the same to two or three different persons ; that in December, 1851, he leased it to John Holmes, who occupied it until the destruction of the building by fire ; that prior to the insurance sought to be recovered, he had insured the same at two different times, — once at the Tremont Insurance Company, and once at the Pacific Insurance Company, — which latter policy was cancelled at the time the policy in suit was taken ; that, at the time of said application, the plaintiff referred the agent of the insurance company to his partner, stating that said partner knew most about the estate ; and that said partner thereupon made the answers contained in the application.

“The defendants also offered in evidence a plan of this and the neighboring estates, for the purpose of showing that the plaintiff did not fully and truly disclose all matters having a material bearing upon the risk ; which plan is made a part of this report.” [That plan shows a “hotel” on Purchase Street, four feet from the principal building on one side ; another building and storehouse on the same street, nineteen feet off, on the other side ; and other buildings (not disclosed in the application) a few feet further from the buildings insured, but within eighty feet thereof.]

“The defendants further contended that the plaintiff must be presumed to know the situation and condition of his own property ; and that if he made incorrect statements, or omitted to state facts material to the risk, it was fatal to the policy, even if the defendants did not prove that they were made or omitted intentionally.

“It also appeared that interrogatory No. 7 was not answered at all ; and the defendants contended that they had a right to

regard no answer as a negative answer. But the court ruled that the defendants, having issued a policy upon the application as it is, without requiring an answer, waived it.

“The court instructed the jury, that if they found the house was occupied as a house of ill-fame, and this fact was known to the plaintiff, or to his agent who made the representation, the plaintiff could not recover ; but that if the building was leased as a hotel, and apparently used as such, but was in fact used by the tenant as a house of ill-fame, without knowledge or consent of the plaintiff, such use would not prevent a recovery ; that, in relation to the relative situation of the buildings, if the plaintiff or his agent knew of the facts, and omitted to state them in his application, the plaintiff could not recover ; that if the facts were not known to the plaintiff or his agent, such omission would not prevent a recovery. The jury found for the plaintiff.”

SHAW, C. J. Though the defendants bear the title of “Mutual Insurance Company,” the present insurance made by them to the plaintiff was in the nature of a stock policy. The execution of the policy being admitted, the loss within the time, and the proof of loss, the defence relied on was that of misrepresentation as to the use to which the insured buildings were put, and the nature and position of other neighboring buildings. Also that the action should have been brought in the county of Worcester, and could not be brought in this county.

The insurance is for \$2,000 ; to wit, \$1,500 on the plaintiff's hotel building, \$500 on stable and shed adjoining, situated No. 248 Purchase Street, in New Bedford, Massachusetts. This corresponds to the description in the application. The defendants insisted that this was not true, but that it was kept as a house of ill-fame, and offered evidence tending to show that such was the fact. And they contended that if this were so, the policy would be invalid, whether the plaintiff knew that the house was so kept or not ; because, they insisted, the application was a part of the policy, and constituted a warranty that the house was kept as a hotel. The clause relied on is in the fourth condition of insurance, that a false description by the assured, of a building insured, shall render a policy absolutely void, issuing upon such description.

The evidence is not stated ; but the court instructed the jury, that if they found the house was occupied as a house of ill-fame,

and that this fact was known to the plaintiff or his agent who made the representation, the plaintiff could not recover ; but that if the building was leased as a hotel, and apparently used as such, but was in fact used by the tenant as a house of ill-fame, without the knowledge or consent of the plaintiff, such use would not prevent a recovery. This, it seems to us, was sufficiently favorable to the defendants. The inquiry, it must be considered, was as to the then description of the building, not what it was intended to be used for, nor whether it was let on a lease at will, or for a term of years. It was truly described as a hotel, occupied by Mr. Holmes, as a hotel, and certainly there was no suppression of a material fact, if not known to the assured, which could be deemed false. If it was a hotel, and used as a hotel at the time, there would be no false representation if it was used otherwise by the tenant, without the lessor's knowledge or consent.

We think the other part of the instruction correct, as to the proximity of other buildings. If the insurers desired more exact information, other questions should have been put accordingly.

The fact, that one question was unanswered, is immaterial ; in fact many questions were not answered. The company, by consenting to make the policy upon the application as it was, waived all claim to further answers.

On the other, and perhaps the principal point, on which the judgment in this case has been suspended, the question has been substantially decided in the case of *Nute v. Hamilton Ins. Co. ante*, 64. The court were of opinion that a stipulation in an original contract, that in case of breach the suit shall be brought in a particular county, or, in other words, that a suit shall not be brought in a county in which it is directed by law to be brought, is not a proper matter of contract. After a contract has been made and broken, the remedy is regulated by law, and of course must be governed by the law of the forum where the remedy is sought, and not by the law of the place where the contract is made. Even if such a stipulation is of any legal force, it is an executory contract only, and cannot be specifically carried into effect and enforced by the court having jurisdiction of the cause and the parties. It is a well settled maxim that parties cannot, by their consent, give jurisdiction to courts, where the law has not given it ; and it seems to follow from the same course of reasoning, that parties cannot take away jurisdiction, where the

Alterations. — Steam-engine.

law has given it. The court are therefore of opinion that the stipulation in one of the conditions of this policy, that, in case of loss, no action shall be brought upon it except in the county of Worcester, is no legal bar to an action in this county, where by law the action might be brought if no such condition had been made.

Judgment on the verdict for the plaintiff.

STOKES vs. COX & others.¹

(Exchequer and Exchequer Chamber, England, 1856.)

Alterations. — Steam-engine.

The plaintiff effected an insurance with the "Birmingham Fire Office," by a policy in which the subject matter of insurance was thus described: "On a range of buildings of three stories all communicating, comprising offices, warehouses, curriers' shops, and drying rooms, having a stock of oil (not exceeding one hundred gallons) and tallow (not exceeding four hundred weight) deposited therein; part of lower story of said building being used as a stable, coach-house, and boiler-house: *no steam-engine employed on the premises: the steam from the said boiler being used for heating water and warming the shops.* Brick and tiled or slated. N. B. The process of melting tallow by steam in said boiler-house, and the use of two pipe stoves in said building are hereby allowed; but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein, nor in any building adjoining thereto." The descriptions of insurance were fourfold, "Common," "Hazardous," "Doubly Hazardous," and "Special Risks;" and the policy stated that "when insurances deemed special risks are proposed, the most particular specifications of the property, and all circumstances attending the same, will be required; But all which special risks must be particularized on the policy, to render the same valid or in force." One of the conditions indorsed on the policy provided that, if after the assurance shall have been effected, the risk shall be increased by any alteration of the materials composing the building, or by the erection of any stove, coal-kiln, furnace, or the like, the introduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy, and a proportionate higher premium paid (if required) such insurance shall be of no force. The insurance in question was a "Special Risk." After the policy was effected, the plaintiff, without notice to the defendants, erected in the stable the machinery of a steam-engine, which was supplied by steam from the boiler mentioned in the policy, but the risk was in no way increased. The premises were afterwards destroyed by accidental fire. *Held* (per Pollock, C. B., and Martin, B., *dissentiente* Bramwell, B.), that the introduction of the steam-engine, and use of the steam generated in the boiler to work it, was a material alteration in the subject matter insured, and therefore avoided the policy. But judgment reversed in the exchequer chamber, *infra*.

DECLARATION on a policy of insurance sealed with the seals of the defendants, being three of the directors of "The Birmingham Fire Office Company." The declaration set out the policy which (so far as material) was as follows:—

"Whereas, the following sums have been paid by Stephen Stokes & Co., of Walsall, Staffordshire, curriers and leather dressers:—

¹ 1 Hurl. & N. 320 and 533.

Alterations. — Steam-engine.

" To the Birmingham Fire Office Company, viz. :

" Present payment for premium from the 14th November, 1853, to the 25th December, 1854	£13 7 6	} Present payment. £20 1 3
" Present payment for duty to ditto	6 13 9	

" Policy and stamp.

" The receipt of which respective sums is hereby acknowledged. AND WHEREAS, it hath been agreed that the following sums shall hereafter be paid yearly to the said company, on the day last aforesaid, during the continuance of this policy, viz.:

" The future annual payment for premium	£12 0 0	} Future payment. £18 0 0
" The future annual payment for duty	6 0 0	

" For the insurance from loss or damage by fire, not exceeding in each case the sum or sums hereinafter mentioned, amounting to four thousand pounds, on the property herein described, in the place or places hereinafter particularized, and not elsewhere, unless previously allowed by indorsement of this policy, viz. :

" On a range of buildings of three stories all communicating, situate fronting to Hatherton Street and Littleton Street, Walsall aforesaid, comprising offices, warehouses, curriers' shops and dressing rooms, having a stock of oil (not exceeding one hundred gallons) and tallow (not exceeding four hundred weight) deposited therein, part of lower story of said building being used as a stable, coach-house, and boiler-house, — no steam-engine employed on the premises, — the steam from said boiler being used for heating water and warming the shops. Brick and tiled or slated	£800
" On stock in trade therein	3,000
" On fixtures and utensils therein	100
" On live and dead stock and utensils in said stable	80
" On carriages in said coach-house	20
	£4,000

" N. B. The process of melting tallow by steam in said boiler-house, and also the use of two pipe stoves in said building are hereby allowed; but it is warranted that no oil be boiled, nor any process of jappanning leather be carried on therein, nor in any building adjoining thereto.

" NOW BE IT KNOWN, That from the date of these presents until the day above mentioned, and so long afterwards as the said assured shall duly pay, or cause to be paid, the said premium and duty to the said company at the time aforesaid, and the acting directors of the said company, for the time being, shall agree to accept the same, the capital, stock, and funds of the said company shall be subject and liable to pay to the said assured all the damage and loss which the said assured shall suffer by fire on the property herein mentioned, not exceeding in each case respectively the sums hereinbefore specified, on the property hereinbefore set forth, according to the tenor of the printed rates and conditions of the said company indorsed on this policy."

Then followed a proviso, that the stock and funds of the company should alone be answerable for demands under the policy.

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The printed rates and conditions indorsed on the policy were (so far as material) as follows : —

"TABLE OF ANNUAL PREMIUMS TO BE PAID FOR INSURANCE.

" Common insurance, 1s. 6d. per cent.

" BUILDINGS.

" Brick or stone buildings, having party walls of brick or stone, and covered with slate, tile, or metal, in which no hazardous process is carried on, or any quantity of oil or other hazardous goods deposited, except for private domestic use, or stove with metal pipe, or any other than common open fires used; or which buildings are not immediately adjoining to any building wherein a hazardous trade is carried on, or hazardous goods deposited.

" GOODS.

" Any description of goods or stock of only common hazard, in buildings not hazardous as above described.

" Hazardous insurance, 2s. 6d. per cent.

" BUILDINGS.

" Brick or stone buildings, having party walls of other materials than brick or stone, and brick and timber, and timber and plaister buildings covered with slate, tile, or metal, and buildings not hazardous as before described in which any stove, coalkiln, kiln, or the like, is used, or in which any hazardous process is carried on, or dangerous goods deposited.

" GOODS.

" Musical instruments, pictures (no one picture to exceed £10 in value unless a specific sum is insured thereon), drawings, medals, and curiosities, clocks, watches, jewels, and trinkets; and hemp, flax, pitch, tar, turpentine, resin, tallow, camphine, or naphtha, oil, spirituous liquors, and other articles of similar risk; and horses, harness, carriages, and fodder, in buildings not hazardous, ships, barges, and other vessels in harbor or dock, or on any canal, or any other inland navigation, with the goods on board thereof; and stage wagons with their contents.

" Doubly hazardous insurance, 4s. 6d. per cent.

" BUILDINGS.

" Brick or stone buildings, thatched, in which fire heat is used, or adjoining any building having fire heat used therein, and in which no hazardous process is carried on, or hazardous goods deposited, and hazardous buildings as before described, in which any hazardous process is carried on or hazardous goods deposited.

" GOODS.

" China, glass, earthenware, looking-glass, plates, pottery, sculpture, and other articles, which, on account of their fragility are liable to destruction in buildings not hazardous. Hazardous goods or stock, as before described, in hazardous buildings, and all goods or stock not hazardous, in doubly hazardous buildings, as before described.

" * * * The above rates of premium are subject to variation according to the circumstances, and buildings or their contents, not specially mentioned in the

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above table, will be rated in conformity with the degree of hazard which may attach thereto.

“ Special risks.

“ Timber, or brick and timber buildings, thatched, having fire heat used therein, or adjoining to any building in which fire heat is used, or in which any hazardous process is carried on; or any stock of lucifer, congreve, or other such like matches, or other hazardous goods deposited, — and generally all buildings or stock of greater risks than is comprised in the foregoing description, under which risks are included the following, viz.: —

“ The buildings and stocks of japanners, sugar refiners, distillers, musical instrument makers, calico printers, flax dressers, saltpetre refiners, dealers in gunpowder, chemists’ laboratories, oil, turpentine, and varnish makers, corn and other mills and manufactories having mill, steam, or engine work and buildings, and stock of maltsters making high dried or porter malt, buildings where other hazardous trades or processes are carried on, theatres, and places of public exhibition, glass-houses, hot-houses and conservatories, with their contents, stained or etched windows if of greater value than 20s., or plate-glass windows if of greater value than 20s. per pane.

“ When insurances deemed special risks are proposed, the most particular specification of the property, and all circumstances attending the same, with a ground plan of the premises, will be required; but all which special risks must be particularized on the policy to render the same valid or in force.

“ No lucifer, congreve, or other such like matches, gunpowder, naphtha, camphine, or the like, except for private domestic purposes, will be allowed in any of the buildings under the first mentioned heads of insurance; such articles, as well as the buildings in which they are deposited, being the subject of special agreement, and requiring to be made known to the office, and recognized on the policy, and a proportionate higher premium paid, otherwise such policy will be vitiated and of no effect.

“ CONDITIONS OF INSURANCE.

“ II. The insured must state his name, place of abode, and occupation, and the nature of the interest he has in the insurance, whether as proprietor, trustee, or otherwise, and must accurately describe the construction of the buildings, and the nature of the goods or other property on which the insurance is proposed, according to the several distinctions herein stated; but the company will not be liable for any misdescription of the property insured, nor for any insufficiency of description thereof, howsoever occasioned, it being the interest and duty of the insured to examine his policy and advise the office of any informality appearing therein. By the regulations of the Act of Parliament, 9 Geo. 4, c. 13, of which the following is an abstract, it is provided, ‘ In all cases a separate sum is required to be apportioned to every separate building or division of building, if separated by party walls; and a separate sum on the several items of property in each division.’ Continual attention must be paid to this regulation, as every violation thereof is subjected by the act to a penalty of £100; and it is by the said act provided, that any policy issued not in conformity therewith shall be absolutely void, and of no effect.

“ III. If any building contain any stove, coalkel, kiln, furnace, steam-

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engine, or the like, or has at any one time any quantity of oil or other hazardous or inflammable goods, or any gunpowder, or fireworks, or any lucifer, congreve, or other such like matches, except such as are required for private domestic use, or any process of fire heat other than the ordinary risk of the common fire and ovens of private houses, the same must be inserted in the policy, and if any misrepresentation be made, or if particular circumstances of risk which attach thereto shall not be specially inserted in the policy, or if there be any concealment or omission whereby the insurance shall have been obtained at a lower premium than is required by the preceding table of premiums, or if the persons insured shall not give notice of any other insurances made on the property insured, whether by any previously existing policy of this office, or by any previous or subsequent insurance in any other office, and cause the same to be indorsed on their policies by the secretary or some other authorized agent of this company, such insurance shall be of no force."

"VII. Persons removing to other dwelling-houses, shops, or warehouses, or opening new communications, or taking adjoining premises into occupation, may preserve or extend the benefit of their policies to cover the goods and stock therein, if the nature and circumstances of the risk insured be not altered; and in case of death the interest in the policy may be transferred to the representative of the party insured; but in all the above cases the policy is not held to be in force until due notice of the removal, alteration, or death be given at the office, or to some agent of the company, and the same allowed by indorsement upon the policy by authority of the company. If, after the assurance shall have been effected, the risk shall be increased by any alteration of the materials composing the building, or by the erection of any stove, coalkel, kiln, furnace, or the like, the introduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy by the secretary, or some other agent of the company, and a proportionate higher premium paid (if required), such insurance shall be of no force."

The declaration then averred that the plaintiff was the person assured by the policy under the style and firm of Stephen Stokes & Co., and was at the time of making the policy, and thence continually until and at the time of the happening of the loss, interested in the insured premises to the amount of £4,000; that the annual premium and duty were duly paid by the plaintiff to the company; that the policy at the time of the loss was in full force; that during the continuance of the policy the buildings, stock in trade, &c., insured, were destroyed and damaged by fire, and the plaintiff thereby then sustained a loss to a large amount, to wit, £490 in respect of the said buildings, and of £2,582 1s. 4d. in respect of the said stock in trade; and the company thereupon became and were liable to pay to the plaintiff the said amounts, or to make good to him his said loss, and

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fully to indemnify him for the same; that the plaintiff has observed all and singular the stipulations, conditions, &c., to be observed or performed on his part, and all matters have occurred and happened, &c., to entitle him to have the several amounts paid to him, or to have the loss made good, &c.; that the capital, stock, and funds of the company are sufficient to pay to the plaintiff the several amounts, or to make good his loss. Breach: that the plaintiff has not, out of the said stock and funds, been satisfied the said amounts, or either of them, but the same are wholly unpaid, nor has he been provided by the company with a like quantity of goods, &c., nor have the said buildings been rebuilt or repaired, &c.

Pleas: First, that after the making and entering into the said policy, and before the happening of the fire in the declaration mentioned, the risk was increased by the erection by the plaintiff, without the consent or knowledge and against the will of the said company, of a steam-engine in and upon one of the said buildings mentioned in and insured by the said policy (such steam-engine being an erection of the like nature as respects the said policy and the stipulations therein contained, as a stove, coalkel, kiln, or furnace), and by the use and employment by the plaintiff, without such knowledge or consent as aforesaid, of the said steam-engine in the said buildings from time to time in course and for the purpose of the said business; and although after the erection of the said steam-engine and before the said fire, a reasonable and sufficient time elapsed in that behalf, yet no notice was given by the plaintiff to the said company of the erection, use, or employment of the said steam-engine; nor was the fact of the said steam-engine having been erected, used, or employed at any time indorsed on the said policy; nor was any higher premium paid to the said company in respect thereof, whereby the said policy became and was void, and is of no effect.

Second, that after the making and entering into the said policy, and before the happening of the fire in the declaration mentioned, the nature and circumstances of the risk insured against were altered and the risk increased by the erection, use, and employment on the said premises, without the knowledge and consent of the said company, of a certain mill, steam, or engine work, which was a special risk of a different kind from,

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and more hazardous than the special risk insured against by the said policy. And the defendants further say no notice of the said alterations was given to the said company, nor were the particulars thereof indorsed on the said policy, or any premium paid in respect thereof.

Replications, taking issue on the pleas.

At the trial, before Cresswell, J., at the Staffordshire Spring Assizes, it appeared that in November, 1853, the plaintiff, who was a currier and leather dresser, at Walsall, effected with the Birmingham Fire Office the policy of insurance set out in the declaration. At that time the state of the premises and the circumstances relating to them were correctly described in the policy. In June, 1854, the plaintiff erected in the coach-house a bark-mill, and in the stable adjoining the machinery of a steam-engine, and he conveyed, by means of pipes, the steam from the boiler mentioned in the policy to the steam-engine, which was used for working the mill. It was proved that there was a greater consumption of fuel, and that more steam was generated than before. No notice of the erection of the steam-engine was given to the company. In December, 1855, the premises were accidentally destroyed by fire.

It was submitted, on behalf of the defendants, that the alteration made in the premises, without notice to the company, avoided the policy. The jury found as a fact, that the actual risk was not increased by the erection of the steam-engine. The learned judge directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit.

Whately, in last Easter term, obtained a rule *nisi* accordingly, against which

Keating & *H. J. Hodgson* showed cause in Trinity term (May 30). The plaintiff is entitled to retain the verdict. The true criterion is this, was the risk increased by the introduction of the steam-engine on the premises? The jury have found that it was not. [POLLOCK, C. B. If the statement in the policy amounts to a warranty, not only of the then state of the premises, but also that no alteration shall be made, it makes no difference that the risk was not increased. In that respect a fire insurance resembles a marine insurance; if a vessel is insured for a particular voyage, the owner has no right to send it on another voyage, and say that the risk is not increased.]

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Where the parties intended that there should be a warranty it is so expressed, as in the memorandum, where "it is warranted that no oil be boiled, or any process of japanning leather be carried on." The allegation in the pleas that the risk was increased, is a material part of them, and must be proved. [POLLOCK, C. B. Not if other allegations are proved which constitute a defence.] In *Sillem v. Thornton*, 3 E. & B. 868, the premises proposed to be insured were described as a house composed of two stories; another story was afterwards added; and it was held that the description amounted to a warranty that the premises corresponded with the description when the policy was effected, and to a warranty that the assured would not, during the continuance of the risk, voluntarily do anything to make the condition of the premises vary from the description, so as to increase the liability of the assured. That case proceeded entirely on the ground that the alteration necessarily increased the risk; and it is only an authority to this extent, that here the description amounted to a warranty of the then state of the premises. [POLLOCK, C. B. This was a "special risk," and the policy provides that "where insurances deemed 'special risks' are proposed, the most particular specification of the property, and all circumstances attending the same, will be required; but all which 'special risks' must be particularized in the policy to render the same valid or in force."] That relates to the third "condition," which requires an accurate and true description of the premises at the time the policy is effected. The seventh condition relates to subsequent circumstances; and it provides that "if, after the assurance shall have been effected, the *risk shall be increased* by any alteration of the materials composing the building, or by the erection of any stove, coalkel, kiln, furnace, or the like, &c., the making of any hazardous communication, or by other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy, &c., such insurance shall be of no force." The words, "risk shall be increased," override all the subsequent statements, which are only certain specified modes by which risk is increased; therefore, by the terms of the contract (which, according to the authorities on this subject, must be read most strongly against the assurers), no alteration will vitiate the policy unless it increases the risk. In *Glen v. Lewis*, 8 Exch. 607, there was an absolute prohibi-

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tion against any alteration being made in a building insured, or any steam, steam-engine, stove, or any other description of fire heat being introduced, unless notice thereof was given, and the alteration allowed by indorsement on the policy; therefore it made no difference whether the risk was increased or not. *Pim v. Reid*, 6 Man. & G. 1,¹ is an authority that the condition which requires a description of the subject matter of insurance and the nature of the risk, has reference only to the time when the policy is effected; and that in the absence of fraud the policy is not avoided by the circumstance, that subsequently to the effecting of it, a more hazardous trade has been carried on without notice to the insurers. [MARTIN, B. That doctrine was disapproved of by the court of queen's bench in *Sillem v. Thornton*, 3 E. & B. 868.] That case depended on the general law of insurance; here the conditions must be looked at, in order to ascertain the terms of the contract. [POLLOCK, C. B. The only question is whether the change of circumstances rendered the policy void, the risk not being in the slightest degree increased. To put an extreme case: Suppose a person insured, under a special contract, premises in which fireworks were manufactured, and the policy contained a provision that no alteration should be made in the premises or business without notice, but afterwards the premises were used as an ice-house, would that vitiate the policy?] No doubt it might be made a part of the contract, that any alteration in the state of circumstances should avoid the policy; but that is not the case here. The stipulations in this policy are divided into two parts: the first relates to the description at the time the policy is effected, and which is provided for by the third condition; the second relates to any subsequent alteration, which is provided for by the seventh condition. The scale of charges increases in proportion to the risk; but the argument on the other side would go to this extent, that if an alteration was made which diminished the risk, the policy would nevertheless be void. They also referred to *Shaw v. Robberds*, 6 A. & E. 75.²

Whately & Phipson, in support of the rule. The question does not depend on whether the risk was, in fact, increased by the introduction of the steam-engine, but whether, by the terms of the contract, the policy is not avoided by any alteration in the state of circumstances without notice. The company undertake

¹ *Ante*, vol. 2, p. 245.² *Ante*, vol. 1, p. 621.

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to indemnify the plaintiff against loss by fire, upon a certain description of premises mentioned in the contract, viz., that "part of the lower story of the building is used as a stable, coach-house, and boiler-house; that no steam-engine is employed on the premises, the steam from the boiler being used for heating water, and warming the shops." That state of circumstances being altered by the introduction of a steam-engine, it is immaterial that the risk was not, in fact, increased. The company expressly stipulate that notice shall be given of any alteration, in order that they may exercise their own judgment as to whether there is any difference in the risk. The statement that no steam-engine is employed on the premises is not a mere description of an existing fact, but an implied warranty that no steam-engine shall be thereafter erected without notice. That being part of the contract itself, the seventh condition is a mere collateral matter, and only applies where there is no provision in the body of the policy. Suppose the policy had stated that a steam-engine, then on the premises, should not be removed without notice; its removal would vitiate the policy, notwithstanding the risk might be thereby decreased. In *Sillem v. Thornton*, there was no stipulation in the body of the policy that a third story should not be added to the building, and it therefore became necessary to ascertain whether the risk was increased by the alteration. Here there is a distinct contract as to what shall or shall not be done on the premises. The company only undertook to insure premises where the steam was used for certain purposes, and the alteration imposed on them a different contract. They were willing to undertake the particular risk for a certain sum, but not if the state of circumstances was altered.

[MARTIN, B. The second plea ought to be amended, by simply stating that after the making of the policy and before the fire, a steam-engine was erected on the premises, and that the steam from the boiler was used for the purpose of working that steam-engine.] Then, independently of the statement in the body of the policy, the seventh condition provides that no steam-engine shall be on the premises. The term "risk" does not mean "actual risk," but a state of circumstances which, with reference to the contract, creates a danger. The question is, whether the risk was increased within the meaning of the policy, not in the opinion of the jury. [POLLOCK, C. B. When an underwriter

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is asked, "Will you effect an insurance on this risk?" the word "risk" does not mean the "danger," but the circumstances which give rise to it.] *Cur. adv. vult.*

The learned judges having differed in opinion, now delivered their judgments *seriatim*.

BRAMWELL, B. I am of opinion that this rule should be discharged. The material facts are, that after the insurance, an engine, a steam-engine, had been put on the premises, which was supplied by steam from the boiler mentioned in the policy; but that no greater risk of fire existed thereby. Now the premises insured having been burned, and there being no fraud, the insurers could only excuse themselves from liability by some term or condition in the policy. They set up two defences: first, that there was a warranty that no steam-engine should be used, or the policy should be void; secondly, a not very intelligible defence, — that the risk was altered. The first defence was founded on the words in the body of the policy, "no steam-engine employed on the premises," which, it was said, means, "was not and should not be." Now it seems to me in this as in all other cases, that where parties to an agreement might in distinct terms have annexed conditions to their agreement, had they thought fit, but have not done so, such conditions ought not to be implied or introduced by construction without almost a necessity for so doing. I am of the opinion that the defendants' construction of the words in question is unwarranted. What would have been the meaning had they stood alone, it is not necessary to decide. They are found in a description of the premises as they then were, which is required by the conditions, and found in connection with some things clearly not warranted, and others expressly warranted. And they may very well mean, and I believe in fact do mean, nothing more than "this is the now description" on which the insurers act (which if false would violate the policy), but for the continuance of which or any part, they provide if at all by other stipulations. However the words cannot be read alone, for the rates and conditions indorsed are referred to in the policy, and become part of it. Now, by the seventh condition it is provided that "if the risk is increased by any alteration of the materials composing the building, or by the erection of any stove, coalkel, kiln, furnace, or the like, the in-

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roduction of any hazardous process, the deposit of any hazardous goods, the making of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy by the secretary, or some other authorized agent of the company, and a proportionate higher premium paid (if required), such insurance shall be of no force." This shows that the insured is not prohibited from making an alteration or adding a furnace, and the like, unless the risk is increased. It is true the added engine is not the "like," because it has no fire, and is attended with no danger; but it is an alteration of circumstances, if anything. But it is said by the defendants that the body of the policy means a steam-engine shall not be added, whether the risk is increased or not, which is consistent with the seventh condition, and each would have a separate meaning and effect. No doubt such a construction is possible, but it is not natural; and I prefer holding that the statement in the body of the policy, read in connection with the condition, is no warranty that a steam-engine shall not be used; and, with those conditions, amounts only to a description of the then state of the premises, with a warranty and condition to make none of the alterations expressly prohibited, and none which should increase the risk.

The second defence is, that the risk is altered, because the special risks include "mill, steam, and engine work." But the truth is, that these rates and risks merely show on what terms the office usually makes its policies. This is shown by the expression, "The above rates of premium are subject to variation according to circumstances." It is certain they might charge extra for a common, or a hazardous, or a doubly hazardous insurance, and charge as high as for a special risk; and for a special risk they may charge as low as for a common. There is no alteration in the nature of the thing insured, though it may be that the added matter would have required particular statement in proposing for the insurance.

Sillem v. Thornton was relied on by each party, but in my judgment that case does not govern this. It was decided on two independent grounds: the first was, that the court held the description of the premises to be a warranty that they were as described at the inception of, and should so continue during, the risk. That was decided on the particular terms of the document

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and facts of that case ; and as they are not identical with those of the present case, we must construe this on its own terms, which, for the reason I have mentioned, I think do not amount to a warranty. The other ground on which that case was decided was, that by the alteration there the risk was increased ; here the jury have found the risk was not increased, and so that also does not apply to the present case.

MARTIN, B. This is an action upon a policy of insurance against fire, effected with the Birmingham Fire Office. The insurances to be effected by the company were described on the back of the policy as fourfold, — common, hazardous, doubly hazardous, and special risks. The insurance in question was a special risk, the premium being considerably above that for doubly hazardous insurances. By the terms indorsed on the policy, the most particular specification of the property insured as a special risk, and all the circumstances attending it, were required to be stated, and they were to be particularized in the policy. The subject matter of the insurance as described in the body of the policy, so far as is material, is as follows : “ On a range of buildings of three stories all communicating, situate fronting to Hatherston Street and Littleton Street, Walsall ; comprising offices, warehouses, curriers’ shops, and drying rooms, having a stock of oil (not exceeding one hundred gallons) and tallow (not exceeding four hundred weight) deposited therein ; part of the lower story of said building being used as a stable, coach-house, and boiling-house. *No steam-engine employed on the premises, the steam from said boiler being used for heating water and warming the shops.* Brick and tiled or slated.” A memorandum at the end of the description of the property insured was this : “ N. B. *The process of melting tallow by steam in said boiler-house, and the use of two pipe stoves are hereby allowed ;* but it is warranted that no oil be boiled, nor any process of japanning leather be carried on therein, or in any building adjoining thereto.”

At the trial before my brother Cresswell, at the last Stafford Assizes, it was proved that after the making of the policy the assured had erected a steam-engine on the premises, and worked it by steam generated in the existing boiler. More steam was used than before, but the jury found that the risk was in no way increased. After the steam-engine was erected, and whilst it was being so worked, the fire happened. The learned judge

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directed the verdict to be entered for the plaintiff, but gave leave to the defendants to move to enter a nonsuit. A rule for the purpose was granted, and it has been argued before us ; and I am of the opinion it ought to be made absolute.

In the case of *Sillem v. Thornton*, 3 E. & B. 868, the court of queen's bench decided that the description of the subject matter insured in the policy amounted to a warranty that the assured would not, during the term insured, voluntarily do anything to make the condition of the premises vary from the description, so as to increase the liability of the assurers. In the judgment I entirely concur ; it seems to me to be founded upon correct legal principles applicable to all insurances. The assurer takes upon himself a risk in respect of the specific subject matter mentioned in the policy ; and whether it be an alteration in the subject matter insured, a deviation from the voyage, or any other thing which by the voluntary act of the assured renders the risk different from that contemplated by the parties and described in the policy, the assurer is discharged.

In the present case there has been no increase of risk, and the case above mentioned is, therefore, no direct authority ; but according to its principle or ratio *decidendi*, as it has been termed, it is to be seen whether, according to the true meaning and intention of the parties as expressed in the policy, the introduction of a steam-engine, and the use of the steam generated in the existing boiler to work it, was a matter which the assurers deemed material, and which was provided for by them in their contract. I think it was. It is expressly stated that no steam-engine was employed upon the premises. It is further stated that the steam generated in the boiler was used for heating water, and warming the shops, and in the manufactory ; it is stated that its further use was allowed for melting tallow in the boiling-house. There is therefore, first, a statement that there was no steam-engine ; secondly, a statement of the purposes for which steam was then used ; and thirdly, of the further purposes for which it might be used, viz., the melting of tallow. It seems to me impossible to contend that all this particularity shall have no effect ; and giving a fair and reasonable construction to the requirement as to special risk and the above circumstances, I think that the introduction of the steam-engine, and the use of the steam to work it, was an alteration in the subject

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matter insured, which the written contract of the parties shows was a material one, and which, when it occurred, suspended the liability of the assurers during its continuance.

It was observed that in the memorandum there was a warranty against certain things, viz., boiling oil and japanning leather, and it was, therefore, argued that there was no warranty against the erection of a steam-engine, or the further use of steam; but to my mind this argument does not much avail; what the law looks at is a substance, and not a name; and the ground of my judgment is, that it is shown by the terms of the policy, that the assured does not mean to insure the buildings in question against fire if a steam-engine was erected therein, and the steam used for the purpose of working it. In this view of the case it is immaterial whether the risk was increased or not. If a man insures a ship for a voyage by one route, he is not liable if the ship sails by another, notwithstanding it be proved that the latter is the safer of the two. The answer is that he did not contract against the risk incurred; and that, in my judgment, is the real answer of the defendants in the present case, viz., that they show by the contract that they did not insure, or mean to insure, these buildings when a steam-engine was erected, and steam used to work it. It was strongly and most properly urged upon us, in behalf of the plaintiff, that the seventh condition shows that no alteration made after the assurance was effected would affect the policy, except the risk was thereby increased. But I think that when the assurers show, by the terms of the contract, that they deem a certain alteration in the subject matter insured material and important, they must be permitted to judge for themselves, and not have the question whether the risk was thereby increased submitted to a jury. To do so would, in the first place, add a new term to their contract; and, in the second, substitute the judgment of a jury upon a matter in which prejudice would be very likely to operate, for the judgment of the assurers themselves. There is a further question whether this defence is admissible under the pleadings. I think sufficient of the last plea is proved; but I think certainly it would be very much better if the plea was amended, and the few facts simply stated. This would raise the question on the record.

POLLOCK, C. B. In my judgment this rule ought to be ab-

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solute. The question turns entirely upon the meaning of the language which constitutes the contract between the insured and the office insuring. If the seventh condition is to be applied to this case, and we are to look to that (and to that only), I should agree with my brother Bramwell that the plaintiff is entitled to recover. But I think the seventh condition is not the only matter to be considered, and giving to the contract what appears to me to be its true construction, I think the defendants are entitled to our judgment.

In looking at such a contract, I think no presumption or intendment is to be made in favor of either party, and the construction is not to be more favorable to the one than the other; we are to ascertain what was really meant by the contracting parties, and to decide accordingly. I think it will facilitate the inquiry as to what is the true construction, to consider how the contract would have stood had there been no such condition at all as the seventh; and then what effect the seventh condition has upon *this* contract, which is based upon the printed rates and conditions indorsed on the policy. The present is a special risk according to the rates and conditions at the back of the policy, — steam is to be used on the premises; that alone makes it a special risk, and the circumstances attending every special risk are to be particularly stated in the policy, otherwise the policy is to be void. Had there been no such condition as the seventh, I am clearly of the opinion that the introduction of a steam-engine on the premises ought to have been in the policy, and that for want of that statement the policy became void. The policy on the face of it states that “The process of melting tallow by *steam* in said boiling-house, and the use of two pipe stoves in said building, are hereby allowed;” it follows that no other use of steam was allowed; it did not require a warranty that no further use of steam would be adopted, — the extent of the use of steam was limited by the allowance. The office had insured *one special risk*, the party insured substituted another, and introduced a use of steam not allowed by the office. I think the contract of insurance related only to the special risk insured, and not to any other that might be substituted for it; and therefore, assuming the policy to be without the seventh condition, the policy is void, and the insured cannot recover.

Now, what is the effect of the seventh condition? It appears

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to me that it does not permit any change of any sort, provided the risk be not thereby increased, and certainly it does not say so. I think it does not abrogate any condition already imposed; it appears to me to be *cumulative*, and substantially to mean that, in addition to all other protections to guard against fraud upon the office, there shall be the general provision that any change of any description which shall have the effect of increasing the risk shall vitiate the policy, unless the nature of the change be communicated to and sanctioned by the office. I think this does not abrogate the special terms which belong to a special risk, and therefore I think the rule ought to be made absolute.

Rule absolute.

On appeal the above judgment was reversed by the exchequer chamber.

Keating (with whom was *H. J. Hodgson*) argued for the plaintiff. The rule to enter a nonsuit should have been discharged. The question turns upon the construction of the particular policy. The court of exchequer has departed from the principle laid down in *Sillem v. Thornton*, 3 E. & B. 868, though they professed to follow it. Here the jury found, by the consent of the defendants, that there was no increase of risk. *Martin, B.*, in his judgment in the court below, referred to the statements in the policy, that no steam-engine was employed on the premises; that the steam generated in the boiler was used for heating water, warming the shops, and in the manufactory, and that its further use was allowed for melting tallow in the boiling-house: but considering the question apart from the seventh condition these statements are in a part of the policy which is not the warranty, — which in fact immediately follows them in these words: "But it is warranted that no oil be boiled nor any process of japanning leather be carried on therein, nor in any building adjoining thereto." — The description in a policy does not amount to a warranty where in the same policy there is an express warranty. Previously to the decision in *Sillem v. Thornton*, there was no case in which it had been held that the descrip-

tion of the premises amounted to a warranty, so that no change could be made if the risk was thereby increased. *Pim v. Reid*, 6 Man. & G. 1,¹ shows the general nature and effect of the description in a policy. *Tindal, C. J.*, there stated that on general principles a policy is not avoided by an alteration of the trade carried on upon the premises. In *Sillem v. Thornton*, at the time when the policy was effected the description of the premises was incorrect: the alteration by the addition of the third story had taken place before the date of the policy. [WILLES, J. Any opinion expressed by the court in *Sillem v. Thornton*, as to the effect of an alteration in the state of the premises insured after the date of the policy, must be extra-judicial.] Where the parties might have annexed conditions to their agreement had they thought fit, but have not done so, such conditions ought not to be implied. If that rule did not apply in cases of this description, it would be impossible for persons assured to know what is a warranty and what is not. The rule for construing documents of this kind is thus stated by Lord St. Leonards, in *Anderson v. Fitzgerald*, 4 H. L. 484: "Every court of justice should endeavor to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that upon the ordinary construction of language he is safe in the

¹ *Ante*, vol. 2, p. 245.

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policy which he has accepted." Now it is a general rule, applicable to all contracts, that the law will not imply a warranty where there is an express warranty. Thus in *Budd v. Fairmanor*, 8 Bing. 48, where a receipt was given "for a gray four-year old colt warranted sound," it was held that the warranty was confined to soundness. It has been suggested that there is an alteration in the nature of the risk, but that is provided for by the seventh condition. The defendants' pleas are founded on the seventh condition, each of them alleging an increase of risk, but neither of them is proved. The court below considered it sufficient if so much of the pleas was proved as constituted a defence. But each plea is entire, and no part of it is proved. [COCKBURN, C. J. Although the plaintiff states that no steam-engine is on the premises, and pays on that footing, he claims to be insured against the risk occasioned by it. The conditions state, that if there is a steam-engine on the premises that "constitutes a special risk." CROWDER, J. This insurance was on a "special risk," and it is found not to have been increased by the addition of the steam-engine.] The policy contains a statement of the different classes of risk, to enable the assured to make a proposal. There is nothing in that part of the policy relating to changes which might take place subsequently to the making of the policy. The conditions are the only part of the policy which contain any stipulations as to a subsequent alteration of the circumstances or the risk. [WILLES, J. Is not the seventh condition the governing condition for the purposes of these pleas?] The lord chief baron said that risk did not mean danger but the circumstances which gave rise to it; but an alteration in the mode of using the premises does not avoid the policy. In *Billings v. The Tolland County Mutual Fire Insurance Company*, 20 Day (American) Connecticut Reports, p. 139, Waite, J., in delivering the judgment of the court, said: "The first exception is that the words in the policy, 'all the above barns are used for hay, straw,

grain unthrashed, stabling, and shelter,' are a warranty that the buildings should be used in that manner and no other; but we do not so understand the language of this instrument. The clause was inserted merely for the purpose of giving a description of the buildings insured, and not to limit their use or to deprive the plaintiff of the enjoyment of his property in the same manner as buildings of that description are generally used and enjoyed, &c. It was indeed competent to the defendants in the policy to limit their liability, and prescribe in what manner the buildings, during the continuance of the policy, should be used, &c. To some extent this has been done in the present case. It was provided 'that no ashes should be kept in any part of the buildings.' The keeping of ashes contrary to that provision would destroy the obligation of the contract. But this provision differs materially from the former: one is a prohibition, the other a description, or at most a warranty that the buildings, at the time they were insured, were such as they were described to be in the policy," &c.

Whately (for the defendant). If there be an express warranty as to a particular matter, it may be admitted that no warranty can be implied as to that matter. The description of risks insured against by this office vary greatly. The statement, "the steam from the boiler being used for heating water and warming the shops," and the allowed use of steam for other specified purposes, excludes the use of it for a steam-engine. If a ship is insured and deviates from the voyage upon which she is insured, that vitiates the policy. [WIGHTMAN, J. There the insurance is an insurance against the perils of the sea on that voyage. COCKBURN, C. J. Your argument is, that the company have pointed out that the erection of a steam-engine is a special risk, and it does not lie in the mouth of one who has effected such a policy to say that the addition of a steam-engine is not an additional risk.] The doctrine supposed to have been estab-

Action by Assignee. — Debt.

lished by *Pim v. Reid*, 6 Man. & G. 1, was questioned by the court of queen's bench in *Sillem v. Thornton*, 3 E. & B. 868, 887. [WILLES, J. In *Barrett v. Jermy*, 3 Exch. 535,¹ it was suggested by counsel on the argument that independently of the conditions, if it appeared that by carrying on a hazardous trade after the date of the policy, the risk was increased, and a fire was occasioned by the circumstances creating the increased risk, the insurer might not be liable; but that if a person exhibited fireworks, or had a chemical laboratory for the purpose of experiments, that would not affect his policy if the fire happened from some independent cause. I recollect that the present lord chancellor and Lord Wensleydale assented to that proposition. On that ground the terms of the judgment in *Sillem v. Thornton*, 3 E. & B. 868, have been canvassed.] The seventh condition is cumulative, and does not merely qualify the circumstances under which steam may be applied to other purposes than those expressly allowed. In *Anderson v. Fitzgerald*, 4 H. L. 484, it was held that the question was not as to the materiality but as to the truth of the statements proving the basis of the contract. [WIGHTMAN, J. That case did not turn upon the question of increase of risk. There was a condition that the representation made, in effecting the insurance should not be untrue.] If the circumstances of the risk are altered the company are to have an opportunity of determining whether they will continue the insurance.

Keating, in reply. The policy is effected on a special risk. [COCKBURN, C.

J. Each of these circumstances constitutes a special risk in itself.] The only part where there is any reference to an alteration in the state of the premises after the date of the policy is in the seventh condition. By agreement the jury have found that what was done did not increase the risk; indeed it was merely the machinery of the steam-engine that was put up. The permission to use steam for a particular purpose does not exclude the use of it for any other purpose, if the risk is not thereby increased. Assuming the use of it to be hazardous, it may nevertheless be used for the purposes named without notice, notwithstanding the seventh condition. If the court construes a policy, which contains an express warranty, as also containing an implied warranty, they will alter the contract of the parties.

COCKBURN, C. J. We are all of opinion that the decision of the court of exchequer must be reversed, and a rule to enter a verdict for the plaintiff made absolute. It is unnecessary for us to express any opinion as to implied warranty in a policy not containing such a clause as the seventh condition in this policy. In our judgment the effect of the seventh condition is restrictive. All that an insurer is called upon to do is, in the event of an increase on the risk, and in that event only, to give notice to the insurance company of the alteration of circumstances. Here it is found as a fact that there was no increase of risk; therefore there was no necessity to give notice.

Rule absolute to enter a verdict for the plaintiff.

FLANAGAN & CARPENTER vs. THE CAMDEN MUTUAL INSURANCE Co.² (Supreme Court, New Jersey, June Term, 1856.) Action by Assignee. — Debt.

If a policy be assigned to a purchaser of the premises insured, with the assent of the insurance company, the assignee may bring an action in his own name on the policy.

Debt is not the proper form of action upon a policy of insurance which allows the company in case of loss either to pay the damages actually sustained or to repair the premises.

¹ *Ante*, vol. 3, p. 6.

² 1 Dutcher, 506.

Powers of Agent.

NEW YORK CENTRAL INSURANCE CO. vs. NATIONAL PROTECTION INSURANCE CO.¹

(Court of Appeals, New York, June, 1856.)

Powers of Agent.

An agent of one company reinsured a risk in another company, of which he was a director and secretary. *Held*, that the second contract was voidable.

THE case is stated in the opinion.

DENIO, C. J. It appears from the opinion of the supreme court, with which we have been furnished, that no doubt was entertained by the judges of that court but that the contract of insurance upon which this action was brought was invalid, nor but that it ought to have been so held, if the defendants had not committed a fault in pleading, by which, as it is decided, they had lost the advantage of that defence. It appears, however, that all the evidence to show the position which Stevens occupied when he executed the policy of insurance, as the agent of both parties, was received without objection; and that as to that question there was no allusion to the pleadings in the course of the trial. This ground was taken by the defendants' counsel on the motion for a nonsuit, and again after the evidence had closed, and yet no answer based upon a supposed defect in the defendants' pleadings appears to have been suggested by the counsel or by the court. The answer does deny the fact of the contract, and that Stevens was the agent of the defendants, or was authorized to sign the policy of insurance. I suppose that in the mind of the pleader this denial was predicated of his supposed incompetency to act as the agent of the defendants in a contract, when he was at the same time acting as the secretary and agent of the plaintiffs. If the principle admitted by the supreme court is correct, it sustains the general denial in the answer; though it is obvious that it would have been more frank to have averred the special facts out of which his incompetency arose. There is, however, no reason to believe that the plaintiffs were misled or surprised by the defence set up under the general pleading. If they had been, they would naturally have objected to the evidence; and it would then have been competent for the defendants, if the point had been ruled against them, to move for

¹ 14 N. Y. 85.

Powers of Agent.

an amendment, or for such other relief as would secure them from the loss of their defence. It was argued by the plaintiffs' counsel that the cross-examination of Stevens, on the part of the defendants, by which his relation to the plaintiffs' company was made to appear, was competent with a view to his credibility, and therefore that no inference prejudicial to the point now made upon the pleadings should be indulged. This is not quite satisfactory. The examination went much farther than was necessary to disclose the witness's relation to the plaintiffs, with a view to show a bias. The resolution of the directors requiring him as secretary to reinsure a class of risks in which this was embraced was proved on the cross-examination without objection. This evidence was not pertinent, except with a view to the ground of defence now insisted on. I am of opinion that the defendants are free to rely upon this defence upon this appeal.

I think the supreme court was right in the opinion that the contract of insurance was invalid, for the reason which has been mentioned. As the courts of the state are now constituted, they apply legal and equitable rules and maxims indiscriminately in every case. In a suit which could not formerly have been defended at law, but as to which the defendant would have been relieved in equity, he can now have the like relief in the first action. Code, §§ 69, 150; *Dobson v. Pearce*, 2 Kern. 157. And such relief consists in denying to the plaintiff a right to recover. It was always theoretically unreasonable (though practically less objectionable than has been supposed), that in one branch of the judiciary the court should hold that the party prosecuted had no defence, while in another branch the judges should decide that the plaintiff had no right to recover. The authors of the Code, aiming at greater theoretical perfection, have abolished the anomaly; and now when an action is prosecuted, we inquire whether, taking into consideration all the principles of law and equity bearing upon the case, the plaintiff ought to recover. It has been settled by a long course of adjudications in the courts of equity, that a trustee or agent of one person cannot make a valid contract respecting the subject matter to which the trust or agency relates, where he has a personal interest. His constituent, it is said, is entitled to have all his skill and judgment employed in his service; but if he is himself the other party to

the contract, the utmost which could be expected from a very honest man would be the ordinary fairness of an umpire. The English cases are, for the most part, collected in Paley's *Principal & Agent*, by Lloyd, 33, and the notes. The courts of this state have followed the principle of these cases with great constancy, and the rule may be considered perfectly well settled. *Torrey v. The Bank of Orleans*, 9 Paige, 663; *Van Epps v. Van Epps*, Ib. 237; *Hawley v. Cramer*, 4 Cow. 736; *Bostwick v. Atkins*, 3 Comst. 53. It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract irrespective of any proof of actual fraud. The principle has been most frequently applied to executed contracts, and to sales of land or goods; but in its nature it is equally applicable to executory agreements and to other subjects. The parties to the contract in this case are both corporations, and must of course transact their business through the instrumentality of agents; and Mr. Stevens was the agent of both parties. The plaintiffs were entitled to all his skill and ability, and the defendants had the like claims upon him. Neither required the services of an indifferent person, whose object might be to secure equal advantages to both the contractors. No one will contend that he, as the defendants' agent, could have made a contract to insure himself; but his duty to the plaintiffs required that he should act in their behalf with all the sagacity and discretion which a fair man would have exercised in his own business. There was, therefore, a manifest inconsistency in his attempting to negotiate this insurance as the agent for the insurers and the insured. The precise case of one person assuming to act as the agent of both parties has been considered as within the rule. *Copeland v. Mercantile Ins. Co.* 6 Pick. 198. Story on Agency, § 211; Paley on Agency, by Dunlap, 33, and note (3); *Ex parte Bennett*, 10 Ves. 381. It is unnecessary to go the length of saying that there was no contract, in strictness of law, though there are some cases which hold that where a bargain is made by a person representing both parties as the agent of each, it is simply a nullity for want of the *aggregatio mentium* which is necessary to the existence of a contract. *Florence v. Adams*, 2 Robinson's R. 556; *Beal v. McKinnan*, 6 La. R. 407. It is enough for the present case to hold that this policy was

Preliminary Proofs.

made under circumstances which would enable the defendants to avoid it upon the principles of equity, and that it is sought to be enforced in a court where these principles are among the grounds of decision. The same question now presented lately arose upon a policy of insurance in the supreme court in the fifth district, and that court held the contract void. *Utica Ins. Co. v. Toledo Ins. Co.* 17 Barb. 132. The opinion of the court, by Mr. Justice Allen, contains a sound exposition of the law.

The letter of Mr. Stevens to the defendants' secretary did not disclose his connection with the plaintiffs' company. What is said as to "risks on property where *our* company have risks," would not necessarily or probably be understood to refer to a company of which the writer was an officer. The expression would naturally be regarded as having reference to an insurance company located in the village in which the writer resided. But if this were otherwise, the answer of the secretary did not authorize the policies which he sent to be issued to that or to any other company in particular, or in a case where it would not be lawful to use them. If it shall be shown on a future trial that the officers of the defendants' company knew or had information of the fact that Mr. Stevens was the secretary of the plaintiffs, it will raise a different question from the one now discussed and decided.

The judgment of the supreme court must be reversed, and a new trial ordered.

All the judges except MITCHELL, J., who delivered an opinion in favor of affirmance, and COMSTOCK, J., who, having been counsel in the cause, took no part in the decision, concurred in reversing the judgment on the ground stated in the foregoing opinion.

Judgment reversed.

SAMUEL BILBROUGH vs. METROPOLIS INSURANCE Co.¹ (Superior Court, New York City, June, 1856.) *Preliminary Proofs.*

Objections to the preliminary proofs cannot first be taken at the trial.

The policy in this case adopted the representations made in an application to another company as part of the contract. And in that application, in reply to the question, "During what hours is the factory worked?" the answer was, "We run the pickers, cards, drawing frames, and speeder, day and night; the rest only twelve hours daily. We only intend running nights until we get more cards, &c., which are making. Shall not run nights over four months." *Held*, a promissory warranty, the breach of which avoided the policy.

¹ 5 Duer, 587.

MORITZ STETTINER vs. THE GRANITE INSURANCE CO.¹

(Superior Court, New York, June Term, 1856.)

Lighting by Gas. — Error.

It seems that an insurance upon goods contained in a store where camphene or spirit-gas is used is void, if the policy declares that lighting "the premises" by such means shall render the policy void.

It is not cause for reversing a judgment that the judge submitted to the jury the question whether spirit gas and burning fluid are the same.

THE facts sufficiently appear in the opinion of the court.

By the Court, WOODRUFF, J. This is an action brought to recover the amount of loss sustained by fire, under a policy, executed and delivered by the defendants, upon the plaintiff's stock of cap fronts and other goods, "contained in the brick building situate No. 101 William Street, city of New York."

The defence insisted upon at the trial was, that the plaintiff, without the permission of the defendants, lighted the premises containing the subject of the insurance, with spirit gas or camphene, contrary to the conditions of insurance.

The conditions of insurance annexed to the policy, and referred to therein as forming a part thereof (and to which the plaintiff, by accepting the policy, must be deemed to have assented), in the eighth article, contains these words: "The keeping of gun-powder for sale or on storage, upon or in the premises insured, or the lighting the same by camphene or spirit gas, without written permission in the policy, shall render it void."

On the trial, the witnesses for the plaintiff testified that on the evening of the fire, and on several evenings previous thereto, the premises occupied by the plaintiff, and containing the insured goods, had been lighted with burning fluid.

The defendants' counsel thereupon moved to dismiss the complaint, insisting that the testimony of those witnesses showed a violation of the above recited eighth condition of the policy. The motion was denied by the court, and the defendants' counsel excepted.

The reason stated in the bill of exceptions for the denial of the motion is the same which formed the subject of a subsequent exception to the charge to the jury, to be presently noticed, viz.: That the eighth condition annexed to the insurance related only

¹ 5 Duer, 594.

to an insurance upon buildings, and not to an insurance upon goods contained in buildings.

It must, however, suffice to say in regard to this motion for a nonsuit, that it did not, at this stage of the trial, appear that "burning fluid" was one of the prohibited articles. The eighth condition specified "camphene or spirit gas," and the court could not say, that "burning fluid was either the one or the other, and therefore the court could not say that it appeared affirmatively that this condition of the policy had been violated."

The motion for a nonsuit was, therefore, rightly denied, whether the reason assigned therefor was correct or not.

The defendants' counsel thereupon called one witness, and one only, who, on his direct examination, testified that he "had dealt in and manufactured the article known as spirit gas and burning fluid. There is no difference between spirit gas and burning fluid; it is called, in the trade, spirit gas as much as burning fluid," and also that he called at the premises after the fire, and found a lamp filled with burning fluid or spirit gas, standing on a desk in the office, and also found a tin can containing a few drops of the same article.

But, on his cross-examination, he testified that "it is about three years since he was engaged in the manufacture of spirit gas or burning fluid; that he was, at that time, engaged in a drug store in Utica; that he had never dealt in or manufactured burning fluid in the city of New York, and did not know anything about the trade in said city, except that when he purchased for his own use he called for burning fluid."

There was no distinct evidence showing where the contract of insurance was made. The attestation clause imports that it was signed by the president and secretary, at the office of the defendants, in Utica, and its effect is qualified by the words "not valid unless countersigned by J. W. Bouck, agent." The policy, however, bears on its face, at its very beginning, an intimation that the policy was issued in the city of New York, thus: "No. 1178, \$400. Granite Insurance Company, New York, office No. 78 Broadway," and it is only countersigned by J. W. Bouck, as agent.

Upon this evidence the court charged the jury, "That whether spirit gas or burning fluid was the same article or not, made no difference as to the result of this suit, inasmuch as the eighth condition of insurance related only to insurance upon buildings, and not to insurance upon goods contained in buildings."

To this the defendants' counsel excepted, and thereupon the court instructed the jury to find specially, in answer to this question, "Was the article of burning fluid used as a means of light by the plaintiff the same article as spirit gas mentioned in the eighth section of the conditions of insurance annexed to the policy?"

The counsel for the defendants objected, and took an exception to the submission of this question to the jury, "on the ground that there was no evidence to discredit the witness who had testified that spirit gas and burning fluid were the same article, and, in the absence of any discrediting testimony, the court was bound to deem such evidence to be true."

The jury found a verdict for the plaintiff, and, to the question specially submitted to them, they returned an answer in writing, that "the fluid spoken of by the witnesses as 'burning fluid' is not 'spirit gas,' referred to and mentioned in the policy."

Obviously, if this special finding is true, the first exception to the charge furnishes no ground for reversing the judgment. For if burning fluid is not spirit gas, then the condition in the policy has not been violated, whether that condition applies to an insurance upon goods or not.

I am of opinion that the court erred in the construction given to this condition, and that it applied to the present insurance as fully as it would to an insurance upon the building itself, and that "the lighting of the premises insured by spirit gas," as used in that condition of a policy upon goods, meant the use of spirit gas as a means of light in and about the goods at the place No. 101 William Street, where the subject of the insurance is described in the policy to be. No part of the words of the policy ought to be rejected as insensible or inoperative, if a rational and intelligent meaning can be given to them, consistent with the general design and object of the whole instrument; and if the condition was broken, then clearly, in my opinion, the plaintiff was not entitled to recover. *Wilson v. Herkimer Ins. Co.* 2 Selden, 53;¹ *Mead v. The North Western Ins. Co.* 3 Ib. 530;² *Westfall v. The Hudson River Fire Ins. Co.* 2 Kernan, 289.³

But it is wholly unnecessary to discuss this question further, because the jury have found that the condition was not violated; and, if that is so, it is quite immaterial whether the court erred

¹ *Ante*, vol. 3, p. 298.

² *Ib.* p. 483.

³ *Ante*, p. 4.

in its construction or not. The error had no bearing upon the question of fact so found.

Are the defendants entitled to have the judgment reversed on exception, because the judge submitted the question to the jury, whether spirit gas and burning fluid are the same?

We think not. It should be observed that this is not a motion for a new trial upon the ground that the verdict is against evidence, but it comes before us upon exception to the submission of the question to the jury at all; and unless the exception was well taken, we cannot reverse, although we may think that the weight of evidence was in favor of the defendants, and that the defendants, had they so requested, were entitled to have instructions given to the jury in relation to the proper force and effect of testimony, and the duty of the jury in respect thereto, which, had they been suggested by the defendants' counsel, and given by the court, might have influenced the result.

The objection and exception are simply and only that the question should not have been submitted to the jury in any form.

It was a question of fact—it was material; indeed, it was the one sole fact upon which the whole defence rested. The defence itself could not prevail unless a verdict was, upon this very question, found in its favor. In the form in which the case then stood (the motion for a nonsuit not having been renewed), there was nothing for the court to do but take a verdict from the jury, and as no instructions to the jury were asked by the defendants' counsel, they cannot complain of the want of any specific directions.

True, it was not necessary for the court to submit any question to be specially answered; but in regard to that, the court have a discretion under section 261 of the Code.

It is, in effect, suggested that the objection taken by the defendants ought to be regarded as tantamount to an insisting at the time that, upon the whole evidence, the defendants were entitled to a verdict, and as equivalent to a request that he should so charge.

It is true, that it has been held that a verdict will not be set aside because the judge charges a jury to find for the plaintiff, if the evidence clearly warrants the verdict, and is neither contradicted nor impeached. *Dean v. Hewitt*, 5 Wend. 257; *Nicholls v. Goldsmith*, 7 Ib. 160. And it is also well settled that it is within the power of the court to grant a nonsuit if it be moved

for when, after the evidence for the defendant has been given, the case is so clearly with him that a verdict for the plaintiff would be set aside as against evidence. See *Rudd v. Davis*, 3 Hill, 287, and cases there cited. But we are referred to no case, and I can find none, in which it is held that where the plaintiff's case is *prima facie* established, it is matter of exception that, though the defence seems clearly proved, the judge submits the case to the jury when a nonsuit is not moved for. See *New York Fire Ins. Co. v. Walden*, 12 Johns. R. 513. And it may well be doubted whether, after testimony on both sides, it is ever error in law, for which an exception will lie, to submit to the jury the very question of fact in issue. The court may, undoubtedly, express an opinion upon the facts, and ought, when requested, to give proper instructions regarding the rules by which the jury should be governed in regard to the construction and weight of the evidence.

Besides, it does not follow that, because in this particular case the one witness for the defendants testified that spirit gas and burning fluid are the same, the defendants here were entitled (if in any case) to a peremptory instruction that the jury find for the defendants. True, a witness is *prima facie* entitled to credit. But even his credibility may and ought to be determined by the jury, if there is room for a rational doubt of the correctness of his testimony when applied to all the facts in the case.

Here the terms spirit gas and burning fluid, if these are regarded as specific names, *prima facie* import different things. The general designation, burning fluid, if it has not a specific, technical meaning, would embrace oil, or turpentine, or any other combustible fluid, or, at least, a fluid of any kind used for burning. If it had acquired a technical meaning, and designated a particular article used for producing light, it was of some materiality to know whether that meaning was general, and the place where the terms burning fluid and spirit gas were used to indicate the same article was important. The witness not only spoke of his knowledge on that subject as acquired and founded upon the use of the terms in Utica, three years before, but admitted that he had never dealt in or manufactured the articles in the city of New York, and did not know anything about the trade in said city, except that when he purchased for his own use he called for burning fluid. The witness was the agent of the defendants. The jury and the court both had an opportunity to see the witness,

and his manner while testifying, and we think that it cannot be said, upon the whole of his testimony, that, as matter of law, the court should have told the jury to believe his evidence on the direct examination, and find for the defendants accordingly.

And though we should feel some hesitation in refusing a new trial if the case was before us upon the broader grounds presented by a motion to set aside the verdict, we feel constrained to say that the defendants' exception in the particular now under consideration was not well taken, and, therefore, that the judgment must be affirmed.

Judgment affirmed, with costs.

THE MADISON INSURANCE COMPANY vs. WILLIAM C. FELLOWES & others.¹ (Superior Court, Cincinnati, Ohio, June Term, 1856.)

Payment of Premiums. — Limitation Clause. — Double Insurance.

1. In a policy of insurance containing a condition that "no insurance shall be considered binding until the payment of the premium," an acknowledgment of its receipt is conclusive for the purpose of giving effect to the policy, as binding, from the time of delivery; the subsequent non-payment of the premium will not avoid it unless it is expressly so provided.
2. When the policy contains a provision that "all claims under this policy are barred unless prosecuted within one year from the date of loss," that condition is performed if, within the year, a suit is brought, in good faith, for the purpose of enforcing the claim; and if the assured for good cause abandon that suit, and promptly bring another, although after the year has elapsed, he is not barred of his right to recover.
3. Where the policy contains a clause "that in case of any other insurance upon the said property, not notified to said company and mentioned in or indorsed upon this instrument," then the policy shall be void, which is relied on as a defence, it is error to admit parol evidence of conversations between the parties, prior to, or contemporaneous with, the delivery of the policy, to prove that the defendant, by the delivery of the policy, without indorsement of the prior insurance, having verbal notice thereof, has waived the contract requiring the indorsement. In a case framed to correct an omission in the policy, on the ground of mistake or fraud, such evidence is admissible.
4. Distinction in the application of the rule, between conditions *precedent* and *subsequent*. In the latter it is enough if the assured give notice in fact of the subsequent insurance, and was ready and willing to have the indorsement made.
5. Where the premises insured consist of two distinct buildings, separately covered by prior insurance, and the subsequent policy covers both, it constitutes a case of double insurance within the meaning of the condition.

WILLIAM C. FELLOWES *et al.* vs. THE MADISON INSURANCE COMPANY.²

1. The first and second points stated in the syllabus of the report of the *Madison Insurance Company v. Fellowes & others*, *supra*, reaffirmed.

2. The condition in a policy of insurance, requiring that "all claims" under it "are barred unless prosecuted within one year from the date of loss," is not void as against public policy.

¹ 1 Disney, 217.

3. The condition requiring notice and indorsement of the policy of prior insurance imposes the duty of compliance on the assured, which cannot be cast upon the insurer, except by clear proof of an express agreement between the parties, or a general usage among underwriters to that effect, and without such proof the court will not reform the policy by requiring an indorsement of the prior insurance upon the policy.

² 2 Disney, 128.

BURTON et al. vs. THE GORE DISTRICT MUTUAL INSURANCE Co.¹ (Queen's Bench, Upper Canada, Trinity Term, 1856.) *Mortgage.*

M. having effected an insurance with a mutual insurance company, assigned all his interest in the policy and premises insured to the plaintiffs by way of mortgage, to secure a debt, and the policy was duly ratified to them in accordance with 6 Wm. IV. c. 18, § 18. A loss having occurred the plaintiffs sued in their own names as assignees, setting out the mortgage in the declaration. Defendants pleaded:—

3. That the debt due the plaintiffs was less than the sum insured—that the assignment was to secure the debt—and as to any surplus, plaintiffs held as trustees for the mortgagor; that before the loss M. insured in another office for £500, which defendants had no notice of, and never consented to or approved of.
4. That before the mortgage to plaintiffs M. had mortgaged the premises insured to one R. in fee, who afterwards effected an insurance with another company, without the knowledge and consent of defendants.

Lastly. That before M.'s mortgage to plaintiffs he had mortgaged the premises insured to R. in fee, which mortgage is still in force and unsatisfied. *Held*, on demurrer, third and last pleas good; fourth plea bad; for although the mortgage to R. mentioned in it would form a good defence of itself, yet it was not relied on for that purpose, but stated only as incident to another and insufficient defence,—viz., the mortgage by R.—and, therefore, it could not be acted on as admitted by the demurrer.

Per ROBINSON, C. J. The 18th clause of the act applies only to absolute alienations, and the plaintiffs in this case, as mortgagees, were not entitled to sue in their own names.

Per McLEAN and BURNS, JJ. They were so entitled.

Per ROBINSON, C. J. A mortgage by the insured in a mutual insurance company, without consent, will avoid the policy.

MERRICK vs. THE PROVINCIAL INSURANCE Co.² (Queen's Bench, Upper Canada, Trinity Term, 1856.) *Hazardous Goods.—Hat-bleaching. — Increase of Risk.*

Plaintiff insured with defendants for £2,000, the property insured being described in his application as his stock of dry goods contained in the first and second floors of a three story building occupied by him as a dry goods store, the third story being occupied by another party as a dwelling and architect's office. By the policy, the insured covenanted that the representations made in the application were true, and that if otherwise the policy should be void; and it was agreed that if the building should during the insurance be used for any trade or business denominated hazardous, extra hazardous, or specially hazardous, in the memorandum annexed to the policy, or for the purpose of keeping or selling any of the goods so denominated, unless agreed to in writing by the company, the policy should be void.

The policy was also subject to certain conditions: amongst which were, that the application for insurance should specify the construction of the building containing the property to be insured, and by whom occupied; that it should be stated whether goods insured were or not of the descriptions denominated hazardous, extra hazardous, or included in the memorandum of special rates; that if after the insurance effected the risk should be increased by any means within the control of the assured, or if such building should be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance should be void.

In the memorandum referred to, hat-finishers and sulphur were included among the trades and goods deemed hazardous, and which it was stipulated should subject the building

¹ 14 Up. Can. Q. B. 342.

² 14 Up. Can. Q. B. 439.

Party to Suit. — Suspension of Risk. — Non-payment of Assessment.

and all its contents to an additional charge; hat-bleaching was included in the class called extra hazardous, and hat-manufacturers in that of extra hazardous (each with the same stipulation as to extra charge), and at the end of the last class was added, "and generally all trades requiring the use of fire heat not before enumerated."

It appeared that the goods kept by the plaintiff consisted in part of millinery, which in the defendants' printed instructions to their agents was classed as extra hazardous, and ordered to be charged at a higher rate; but it was not mentioned in the policy or conditions. Also, that the business of bleaching straw bonnets was carried on in the third story (described in the application as occupied for an architect's office), and a stove introduced into the cellar for the purpose of this process, in which sulphur was also made use of. No notice was given to defendants of any of these changes. A fire occurred, and an action having been brought, the jury found for the plaintiff. On motion for a new trial: *Held*, that the policy was avoided; that bleaching bonnets was included in the trade of "hat-bleaching" mentioned in the class "extra hazardous," and that the plaintiff having carried on that business without notice to defendants, no question as to the increase of risk thereby was left for the jury, but the policy by the express terms of it was at an end.

Held, also, that the other conditions were broken, for the occupation of the building was altered, and the risk increased by means within the control of the assured.

The keeping millinery would not have been fatal, for plaintiff could not be supposed to be aware of defendants' instructions to their agents; nor would the use of sulphur, for the memorandum referred to it only when kept as stock.

Seem, that upon the evidence set out, the pleas denying plaintiff's interest in the goods should also have been found in defendants' favor.

BLANCHARD vs. ATLANTIC MUTUAL FIRE INSURANCE COMPANY.¹ (Supreme Court, New Hampshire, July Term, 1856.)

Party to Suit. — Suspension of Risk. — Non-payment of Assessment.

The suit upon a policy, issued by a mutual fire insurance company, should, in case of loss, be in the name of him who is at the time the member of the company.

If the charter of an insurance company contain a provision against double insurance, such insurance, without consent of the company, will avoid the policy.

A by-law of an insurance company, providing for the suspension of the risk during the non-payment of assessments, is constitutional.

Where an insurance company issued a policy to G. on property of his, he giving a premium note to pay such assessments as should be made against the policy, but the insurance, in case of loss, was made payable to B. *Held*, that the action should be brought in the name of G., he being the member of the company.

Where the by-law of an insurance company provided that if the insured should neglect, for the space of ten days, when personally called on, to pay any assessment, the risk on the policy should be suspended till the same should be paid, and it appeared that an assessment had been made and duly demanded, according to the terms of the by-law, but that payment had not been made. *Held*, that the risk was suspended during the non-payment, and that, if the property was destroyed during the suspension, the insurance could not be recovered.

¹ 33 N. H. 9.

Double Insurance. — Increasing Risk.

FABYAN vs. UNION MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, New Hampshire, July Term, 1856.)

Double Insurance. — Increasing Risk.

A double insurance having been obtained contrary to the terms of a policy, the circumstances considered as to whether the defendants were estopped to set up the facts in an action on the policy.

The setting up of seven stoves in the building containing the insured property held to authorize the jury to find an increase of risk.

THE case is stated in the opinion.

SAWYER, J. The contract of insurance, upon which the plaintiff seeks to recover, is in writing, as contained in the policy of insurance, and the defendants are to be held liable upon the contract only in accordance with the terms and stipulations therein expressed, as the conditions and limitations of their liability. By express reference in the policy to the provisions of the act of incorporation and by-laws of the company, those provisions are incorporated into the contract, and thus make essential parts of it. Among the provisions thus embraced are those contained in the 16th section of the act, and the 19th article of the by-laws; and the contract is to be construed in the same manner as if those provisions were inserted *in totidem verbis*, as conditions and limitations of the defendants' liability under it.

The agreement between the parties thus being reduced to writing, effect and operation are to be given to it as in other cases of written contracts, according to the obvious meaning of its terms. No other interpretation can be given to those provisions, thus considered as conditions of the contract, than that the defendants are not to be liable upon the policy in the cases specified in the 16th section of the act and the 19th article of the by-laws, unless such proceedings are had as are therein specified. This is the agreement into which the parties have entered, and which they have reduced to writing. The defendants stipulated for such a qualified or contingent liability, and the plaintiff accepted the policy upon that understanding. It must be presumed, in the absence of any evidence of fraud, that the plaintiff was informed of all the provisions of the act and by-laws, qualifying or limiting the liability of the defendants.

A double insurance was obtained by plaintiff in the Atlantic Company, of which no notice was given to the defendants, and to

¹ 33 N. H. R. 203.

Double Insurance. — Increasing Risk.

which their assent was not given, as required by the 16th section of the act. By the terms of the policy, this discharged the defendants from liability, their promise contained in the policy to pay to the plaintiff, in case of loss, being upon the condition that in case of such double insurance, their assent thereto should be indorsed on the policy. It is contended, however, by the plaintiff, that the defendant should be estopped from setting up this provision of the act as a condition or limitation of their liability under the contract, because of the proceeding of the company in causing what purports to be their act of incorporation to be printed upon the back of the policy, and which, in fact, does not contain the 16th section. This proceeding, it is said, was of a character to mislead and deceive the plaintiff; and it is contended that he, finding upon the back of the policy what the company have thus held out to him as their act of incorporation, containing no such provision, may be supposed to have accepted the policy upon the understanding that it was what they held it out to be, and that they are not at liberty to claim that such provision is contained in the act constituting a limitation upon their liability. An examination of the matter printed upon the back of the policy shows conclusively that it is not claimed to be the entire act, and that, with the ordinary degree of attention, it could not have been so understood by the plaintiff.

Two sections of the act only are printed, the first and the last, and designated respectively, as printed, section 1 and section 20; the former containing the names of the grantees, the incorporating clause, and a summary of the purposes and objects of the corporation, usually contained in the first section of such an act; the latter merely specifying the time when the act is to take effect. In the first it is declared that the grantees named, and such other persons as may hereafter become members of the company, *in the manner hereinafter prescribed*, are incorporated and made a body politic, no provision being contained in either section, as printed, prescribing the manner in which other persons may become members. The slightest attention would show that the whole act was not contained in these two sections; that, in fact, the eighteen intermediate sections were omitted; and the printing of these two upon the policy, with the other eighteen thus shown to be omitted, would furnish no evidence to the jury that the printed matter contained the whole act, or that the plain-

tiff, with ordinary care and attention, could have been misled by it.

Upon the other ground, also, the defendants were released from their liability upon the policy.

The setting up of seven stoves in the hotel in which the property was kept and used, was such a change of circumstances as that the jury might have found that the risk was thereby increased. It was understood by the plaintiff himself to be increased thereby to some extent. This is implied in the statement contained in his letter of the 8th of February, that it is not "much increased." Under the provision of the 19th article of the by-laws, such a change avoided the policy, unless an additional premium and deposit were agreed upon. Upon being notified of this change, the company declined to continue the insurance, and refused to arrange an additional deposit and premium, and immediately notified the plaintiff of their determination.

By the terms of the contract, they had the right thus to terminate it, and, as by the provisions of the case a verdict is to be entered for the defendants if the evidence would warrant it, the verdict must be set aside, and a

Verdict entered for the defendants and judgment rendered thereon.

JABEZ AMESBURY & another vs. BOWDITCH MUTUAL FIRE INSURANCE Co.¹ (Supreme Court, Massachusetts, September Term, 1856.) *By-law. — Place of Suit. — Limitation.*

A by-law of a mutual fire insurance company, which consists of several distinct and independent parts, may be valid as to one of those parts, though void as to the others.

A stipulation, contained in a by-law of a mutual fire insurance company (to which their policies are in terms made subject), that in case of loss, if the assured shall not acquiesce in the determination by the directors of the amount thereof, any action for the loss claimed must be brought within four months after such determination, at a proper court in the county in which the office of the company is established, is valid so far as concerns the limitation of time, though void so far as it affects the jurisdiction of courts.

A by-law of a mutual fire insurance company (to which their policies are in terms made subject), which provides that, upon notice of a loss, the directors shall proceed to determine and pay the amount thereof; but if the assured shall not acquiesce in their determination, any action for "the loss claimed" must be brought within four months after such determination, does not prevent the assured from commencing an action after that time for the amount determined by the directors. And the assured, in an action brought after that time upon the policy, to which the company answer admitting the loss, and averring a determination of the amount thereof by the directors, and relying upon such limitation of time in the by-law, may amend by declaring for the amount so determined, and take judgment therefor, without further trial.

¹ 6 Gray, 596.

Agent's Powers.

AMES vs. NEW YORK UNION INSURANCE CO.¹ (Court of Appeals, New York, September, 1856.) *Notice of other Insurance. — Waiver.*

The policy in this case was to be void in case of the existence of prior insurance, not noted on the application or indorsed on the policy, or otherwise approved in writing by the secretary of the company. *Held*, sufficient that prior insurances were stated in the body of the policy.

The defendants having issued a policy with knowledge of a verbal notice to their agent of an incumbrance upon the property insured, cannot afterwards insist upon written notice. The policy provided that suit should be brought within six months from the time of the loss, and that the sum insured should not be payable until ninety days after proofs of loss were filed. The plaintiff filed proofs within nine days after the loss. The defendants objected to them eighty-five days afterwards, and upon correction, insisted upon ninety days' time for payment. At the end of this time they set up the expiration of the six months in defence. *Held*, that the defence was waived.

WILSON vs. THE GENESEE MUTUAL INSURANCE CO.²

(Court of Appeals, New York, September, 1856.)

Agent's Powers.

The company's agent having been "duly authorized to take applications for insurance," has no authority under this grant to approve of subsequent insurances.

THE case is stated in the opinion.

COMSTOCK, J. One of the provisions of the policy was, that if the insured or his assigns should obtain any other insurance on the same property, the policy should be void, unless within a reasonable time the additional insurance should be notified to the company and indorsed on the instrument, or otherwise approved in writing. A subsequent insurance for \$2,000 having been procured from another company, it is conceded that the policy in question is void unless the condition has been complied with; and the question is, whether Park, the agent, who assumed to approve of the second insurance, acted by authority derived from the defendants. The appointment of Mr. Park as agent was in writing, and under the corporate seal of the defendants; and by its terms it declared that he "had been regularly appointed an agent and surveyor of the company, and was duly authorized to take applications for insurance." This was the only express authority which the agent ever received from the company, and there is no evidence in the case from which any other can be implied. It does not appear that he was ever held out to the world by his principals as possessing any power not included in his

¹ 14 N. Y. 253.

² 14 N. Y. 418.

Agent's Powers.

written appointment, or that he ever performed any acts as agent until the one now in question, which that appointment would not in terms justify. The defendants, therefore, are not bound by his approval of the subsequent insurance, unless that act is included within the written power.

What, then, is the construction of the writing from which the agent derived his authority? It is open to only two interpretations. One is, that it constitutes an agency limited to receiving applications for insurance, and, of course, communicating them to the company; the other, that there is no limitation. The writing first declares that Mr. Park is appointed agent. This is general and unlimited, unless by the declaration immediately following, that he is duly authorized to receive applications. If we measure the authority by the first clause only, then there is nothing to restrict it, and the agent may make contracts of insurance, adjust losses, approve of subsequent policies, and, in short, wield all the powers of the corporation. If we take the succeeding clause as a qualifying and restricting one, it defines the agency precisely. It is then confined to the negotiation of contracts, without authority to bind the company at all; and this, in my opinion, is the true construction. If the agency is not thus qualified, but, on the other hand, is general, then the last clause of the writing has really no meaning or force at all. It neither adds to nor subtracts from what precedes it. A general authority is first created, and then a very limited one is specially given. This, I am satisfied, was not the intention of the author of the power. The design was to constitute an agency with the powers specified and no other. If this be not so, then, I repeat, the writing suggests no limitation whatever. The agency is either general, and extends to all the business of the corporation, or it is limited to surveys and receiving applications. There is no middle ground, and between these two constructions there is no room for hesitation.

In the case of *McEwen v. The Montgomery County Mutual Insurance Company*, 5 Hill, 101,¹ there was a provision in the policy that it should be void in case the assured had already made any other insurance not notified to the company. There was a prior insurance, but notice of it was given to the travelling agent of the company, whose authorized business was to solicit insur-

¹ *Ante*, vol. 2, p. 269.

ances, make surveys, and receive applications. It was held that the notice was sufficient, and the policy was accordingly adjudged to be valid. The powers of the agent in that case and in the present one are similar ; and I have no doubt that notice to Mr. Park, at the time of receiving the application, of the prior insurance, would be good. He was authorized to negotiate contracts of insurance, and therefore any facts which the company required to be made known before entering into the contract might properly be communicated to the agent. A prior insurance is a fact which enters into the negotiation and then into the contract. The fact may therefore be notified to the agent who negotiates, and it is his duty to communicate it to his principals before the contract is concluded. But I cannot see that it is any part of the duty of such an agent to deal with the assured, in any respect, after the policy is issued. The agent's functions have then ceased in respect to that contract, and he has no power to save it from forfeiture by his approval of a subsequent insurance.

It was suggested on the argument that the defendants are estopped from insisting that the policy is void by reason of having made an assessment on the premium note which was paid by the insured. It does not appear, however, when the assessment was imposed, nor whether the payment was made to any one authorized to receive it. The evidence, I think, is not such as to present the question of estoppel.

The judgment should be reversed, and a new trial granted.

DENIO, C. J., A. S. JOHNSON, SELDEN, and HUBBARD, JJ., concurred in the foregoing opinion. T. A. JOHNSON, J., took no part in the decision. WRIGHT and MITCHELL, JJ., dissented.

Judgment reversed.

ISRAEL WILSON vs. THE CONWAY FIRE INSURANCE CO.¹

(Supreme Court, Rhode Island, September, 1856.)

Powers of Agent. — Warranty. — Representation.

An agent for an insurance company, empowered merely to receive written applications for insurance, to transmit them to the company, and, if they decide to take the risk, to receive the policy executed by them, and to issue it to the applicant, upon receipt from him of the premium, is not the agent of the company for the making of applications ; and if employed by the applicant, or permitted to act for him in drawing up the application, is *his* agent, for whose mistakes of fact committed in the statements or answers to interrogatories in the applications, *he* is responsible.

¹ 4 R. I. 141.

Powers of Agent. — Warranty. — Representation.

If, however, the agent, being empowered to *receive* and *transmit* written applications for insurance to the company, be requested by the applicant to copy the answers which he *shall* make in another application for insurance upon the same property taken away by him to fill up, instead of waiting until he receive from the applicant such answers to copy, send to his company an old application for insurance upon the same property corrected to suit the change of circumstances by himself, thus *sending* an application which he was not authorized by the applicant to send, the company is estopped from setting up the mistakes of fact in the application so mis sent by their agent in defence to a suit on the policy for loss under it.

The company cannot be affected with notice by *verbal* communications made by the applicant to an agent authorized only as above; and in a suit upon the policy for a loss, evidence of verbal communications of facts made to the agent varying from the statements in the written application is inadmissible to avoid the effect of misstatements or mistakes in the written application.

If it be doubtful from the words of a policy whether certain statements made by the insured, relative to the subject of insurance, are to be regarded as warranties or representations, they will be regarded as representations merely.

Where the written application for a policy of fire insurance contained amongst others the following questions and answers: "19. Are the works operated on account of the proprietors or are they rented? Ans. By the proprietors. 20. Are they immediately superintended by one of the proprietors? If not, by whom? Ans. Yes." Which answers were both untrue; *it was held*, that evidence was inadmissible to show that these misstatements were, under the circumstances, immaterial to the risk; since, whether they were to be regarded as warranties or not, they were, being asked and answered, made by the parties material as representations, and so their truth made a condition of the policy, whether they were in fact material or not.

MOTION for a new trial. This action was upon a fire policy effected by the plaintiff with the defendants, through an agent of the defendants, residing in Providence, who, as it appeared by the evidence at the trial, was empowered solely to receive written applications for insurance at Providence, to transmit them to the board of the defendant company at Conway, Mass., and if they issued policies upon applications thus sent, to receive the premiums, and deliver the policies to the assured. The policy insured the plaintiff against loss or damage by fire to the amount of \$2,500, and, as it is stated in writing upon its face, "on his movable machinery contained in the stone building with shingle roof, situate in the town of Exeter, R. I., and occupied for the manufacture of cotton yarn. Reference is had to application No. 2274, which is made a condition of this policy; \$2,500 subsists on same elsewhere."

The policy also contained on its face a printed clause in these words: "and that this policy is made and accepted, in reference to the survey on file at this office, and the conditions thereto annexed, *which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise provided for.*"

On another page of the sheet on which the policy was printed and written, headed, in large type, "Conditions of insurance referred to in the body of the foregoing policy," were printed seventeen articles, specifying, amongst other things, what goods and occupations were to be deemed not hazardous, hazardous, extra hazardous, and what prohibited; what applications for insurance must specify; the effect of false descriptions of buildings or contents insured, of increase of risk, the mode of preliminary proof, and the like.

In the 4th article of these conditions, it is stated that "applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured; *by whom occupied*, whether as a private dwelling or otherwise;" and after several other provisions with regard to what it must contain, follows these two sentences: "And a false description by the insured of a building or of its contents, or *omitting* to make known any fact or feature in the risk which increases the hazard of the same, or in a valued policy an overvaluation, shall render absolutely void a policy issuing upon such description or valuation. *And if any survey, plan, or description of the property herein insured is referred to in this policy, such survey, plan, or description thereof shall be deemed and taken to be a warranty on the part of the assured.*"

The paper referred to in the policy as application No. 2274, was entitled on the outside, as folded for filing, "Application of Israel Wilson, Sept. 13, 1855," and above this title appeared in figures, "2274." At the bottom of the paper outside, as folded for filing, was printed, "*Application filed and survey made by,*" and then below in writing, "Immanuel Searle." On the inside this paper was headed:—

"Conway Mutual Fire Insurance Company.

"Class No. 2.

Policy No. 10.

"Survey of a *building* on which insurance is to be predicated."

Amongst the twenty-six questions and answers of this application were the following:—

Question 18. Are the buildings and machinery both owned by the applicants for this insurance? If not, state by whom, and the nature of your interest. Answer. Yes.

Question 19. Are the works operated on account of the proprietors, or are they rented? Answer. By the proprietor.

Question 20. Are they immediately superintended by one of the proprietors? If not, by whom? Answer. Yes.

At the trial before the chief justice, at an adjournment of the September term of the supreme court for the county of Kent, held at East Greenwich in October, the total loss by fire of the property insured, and to an amount greatly exceeding all insurance thereon, was proved to have occurred on the night of the 10th November, 1855. It was admitted that "the works," instead of being operated on account of, and superintended by the proprietor and assured, Wilson, were rented to, operated on account of, and superintended by, Alexander S. Hopkins; and that the answers to the 19th and 20th questions of the application were false. It was evident that this falsity was caused by mistake; the agent of the defendants, Searle, swearing that Hopkins, who procured the insurance for the plaintiff, Wilson, corrected with him, Searle, an old application upon which a policy had been effected at the same office by a former proprietor, which he, Searle, was to send to the office at Conway to obtain a policy upon, and which he signed "Israel Wilson, applicant, by Immanuel Searle," and sent to the office, the same being, in fact, the only application sent, upon which the policy issued; and Hopkins swearing, on the part of the plaintiff, that the agent and himself agreed that he, Hopkins, should take out to Wilson a form of application for the Hampden Office for \$2,500 insurance on the same property, and which he was to bring back to Searle properly filled up, and which Searle, who was agent for both companies, was to copy and send to the Conway Office for the purpose of procuring the policy in question. He also swore that Searle delivered to him three blank forms of applications for insurance to the Hampden Office, having no such blanks of the Conway Office, one of which was properly filled up by himself and Wilson for the purpose of procuring the \$2,500 insurance on the same property proposed to be effected at the Hampden Office, and which he brought back and handed to Searle for that purpose, as well as for the purpose of having the answers contained copied by Searle into a blank form of application, when the same could be procured, for the purpose of obtaining the insurance now in question at the Conway Office; that the insurance was effected through Searle at the Hampden Office upon the application thus filled up by himself and Wilson; that both Wilson and himself supposed that the

insurance at the Conway Office was procured upon an application, the answers in which were copied by Searle from the above application to the Hampden Company, according to the agreement and understanding between himself and Searle above stated. He further swore, that he communicated to Searle, the agent of the defendants, that he was the tenant of the mill, and run the same, the duration of his lease, his superintending of the mill, and the like ; all of which Searle denied, or swore that he had no recollection of.

Upon these facts the presiding judge ruled, that the paper referred to in the written part of the policy as "Application No. 2274," and made "a condition" of the policy, was, by such language, to be classed with the conditions printed on a page of the sheet containing the policy, and headed, "Conditions of insurance referred to in the body of the foregoing policy ;" that this policy obviously distinguished between an *application*, and a *survey*, plan, or description of the property insured, which it made in terms a warranty on the part of the assured. He noticed that the paper referred to in the policy as an application was so named on the outside, and it was also there said, that the *application* was *filed* and the *survey made* by Immanuel Searle, the agent of the insurers, although on the inside it was headed "Survey of a building on which *insurance* was to be predicated," which clearly this paper was not, under this policy, since there was no insurance effected by it on any building. Upon looking into the printed conditions amongst which he deemed this paper to be embraced, he said, that he found this same distinction between the application and the survey, plan, or description of the property insured, carefully kept up, as if a different effect was to be given to that part of the paper which was treated as an application and that part which described the property ; that the 4th article of the conditions specified what the "application" must contain, and amongst other things, by whom the building to be insured, or containing the property to be insured, "is occupied," and then went on to declare, that "a false description by the insured of a building, or of its contents," shall, together with omission to make known any fact or feature increasing the risk, and an overvaluation in a valued policy, "*render absolutely void a policy issuing upon such a description or valuation.*" With this distinction thus made are ushered in, he observed, in this 4th ar-

title of the conditions, the words relied upon to make every answer in the application a warranty, "and if any survey, plan, or description of the property *herein insured* is referred to in this policy, such survey, plan, or description shall be deemed and taken to be a warranty on the part of the assured." He concluded that, as he did not deem an answer to a question as to who run or superintended a mill, a plan, survey, or description of the machinery in it insured, and as the assured distinguished in that respect between parts of the application, he should not hold the answers referred to as *warranties*. Taking thus a distinction set up by the policy itself, between what in the application was *warranty* and what was something else, and therefore a *representation*, he held, however, inasmuch as the 19th and 20th questions and answers related to a matter in itself material to the risk, that they were made by the parties material by being asked and answered, that thereby their materiality was concluded, and that no evidence could be admitted to show that they were not material in this particular case.

As this distinction was not questioned by the party moving for a new trial, it is here stated. The other rulings, being embraced in the motion for a new trial, it is unnecessary to repeat here.

Under the instructions given by the judge, the jury returned a verdict for the defendants, and a motion for a new trial was thereupon filed by the plaintiff upon the following grounds:—

First. Because the presiding judge instructed the jury that whether they believed the witness Hopkins, or the witness Searle, the said Searle, in what he did relative to this application for insurance was to be considered the agent of the plaintiff, and not the agent of the defendants.

Second. Because the judge instructed the jury that the delivery to Searle, the agent of the defendants as well as of the Hampden Insurance Company, of the application for insurance by both companies, under the circumstances of the case, was not an application by the plaintiff for insurance made to the defendants; and that when Searle was directed and undertook to obtain the policy in suit thereupon, whether the jury believed the testimony of Searle or Hopkins, Searle, in what he did in relation to the application, was to be considered as the agent of the plaintiff; and that whether the errors in the application were made by the plaintiff, or through the mistake of Searle, without the knowl-

edge or consent of the plaintiff, yet the erroneous application was to be considered the application of the plaintiff.

Third, in substance, that the judge ruled out evidence offered by the plaintiff to show the immateriality to the risk of questions and answers in the application respecting who occupied, operated, and superintended the "works," a part of the machinery in which was insured; the plaintiff offering to prove, as a matter of fact, that the risk would be less hazardous if the mill were operated on account of, and superintended by the tenant Hopkins, than if operated and superintended as represented by the plaintiff.

It was agreed that the motion should be argued before the court sitting in Providence, and judgment thereon entered by the clerk of the court for the county of Kent, as of the September term.

At the September term of the court for the county of Providence, the motion was argued by *Cozaens & R. W. Greene* for the motion, and by *Bradley* against it.

AMES, C. J. The decision of this motion turns upon the legal effect of a very few facts, the simple statement of which is the best argument that can be made of the questions which it involves. Searle, the agent of the defendants, through whom the plaintiff effected his policy with them, was not, according to the proof, the agent of the defendants to make contracts of insurance binding upon them, but only had the limited power, to issue blank forms of application for insurance, to receive them from the applicants when filled up with the answers to the questions proposed in the applications, to transmit applications for insurance in this shape to the office of the company at Conway; and if the board of directors chose, upon the basis of an application thus received, to fix a rate of premium for the risk proposed, and to make out a policy to cover it, to receive the policy, and upon receipt of the premium, to deliver it to the assured.

In the case at bar, it being admitted that the answers to two questions in the application, relating to the person on whose account the plaintiff's mill was run, and who superintended it, were false, through error or mistake of some one, the question upon the testimony was, whether the mistake was made by Alexander S. Hopkins, the agent of the plaintiff and applicant to procure the insurance, or by Searle, the agent of the defendant insurance

company through whom it was effected with them. Both were witnesses in the cause, on the part of their respective principals, and each threw the mistake in question upon the other. The testimony of Searle, in substance, was that Hopkins and himself sat down together in his, the agent's, office, at Providence, and taking an old application upon which a prior insurance for \$5,000 had been effected at this office, by the former proprietor of the mill, altered it to a request for \$2,500 insurance, the former amount of \$5,000 to be divided between this and the Hampden Office, of which the witness was also agent; that they corrected this old application also as to the amount of incumbrances specified, and to suit the known change of property, and, having concluded that it was then right, Hopkins, as the agent of the plaintiff, directed him to send it to the company, as Wilson's application for insurance, although he did not, in words, authorize him to sign it for Wilson. The application thus made out was signed by him, Searle, for Wilson, was sent by him to the company, and the policy sued was issued upon the basis of it, no other application to that office for the plaintiff having been proposed, or by him received or transmitted to the defendants. He also swore that Hopkins did not inform him that he, Hopkins, had rented the mill, and was running and superintending it on his own account; but that, on the contrary, although he knew that the plaintiff had been a farmer, he supposed, as the application represented, that the plaintiff occupied, run, and superintended his mill himself.

Hopkins, on the other hand, as a witness for the plaintiff, swore that although there was a proposition made to him by Searle to correct and alter the old application for the new purpose, upon his explaining to Searle his tenancy, superintendency, and the like, it was agreed that this old application would not answer at all; that thereupon Searle, having no Conway Company blanks, handed him three Hampden Company blanks, for Wilson to fill up; that he took them out to Wilson, and one of them was filled up by Wilson and himself as an application to the Hampden Company for \$2,500 insurance on the same machinery, upon which Searle afterwards handed to the plaintiff the policy effected thereon with that company; and that when he, the witness, brought back to Searle the application filled up for insurance by the Hampden Company, it was agreed between

him and Searle, that he, Searle, should, copying the Hampden application, fill up from the answers contained in it a blank application of the Conway Company, and send it to the Conway Office for the other \$2,500 insurance upon the machinery in the mill, which it had been proposed should be taken by that company.

Upon this state of the proof, omitting particulars unimportant to the first ground for a new trial set forth in the motion, the judge presiding at the trial, in substance, instructed the jury that whether they believed the testimony of Hopkins or of Searle, the latter, in what he did in his relation to *this* application, was to be deemed, though the agent of the defendants for some purposes, as the agent of the plaintiff; and that though the jury believed that the falsity of the application was caused by the fault or error of Searle, it could not affect the defence of the company, who were not to suffer from the errors of their agent, when employed by, and acting in the proper business of the plaintiff.

Upon familiar principles of the law of agency, we are all satisfied that the distinction here alluded to and applied by the judge is well settled by authority, and indeed is the necessary result of proper deductions from those principles. The plaintiff was contracting, through *his* agent, with the defendants, through *their* agent; and well knew, as the course of the whole transaction showed, that the latter had no general power from the defendants to make contracts of insurance which should be binding upon them, but only the power to receive written and printed applications from those wishing to procure insurance, transmit them to the home board, and if they chose to issue policies upon them, to deliver the policies to, and receive the premiums from the persons for whom the policies were intended. If, under such circumstances, the plaintiff chose to employ the agent of the insurers to do a duty which was incumbent on himself under the contract, and thus to make him for the performance of that duty *his* agent, he is not to be released or excused from consequences resulting from the carelessness or want of skill of the person thus employed by him, because that person is also employed by the other contracting party in another portion of the same transaction. Without burdening our opinion with the many decided cases cited by the learned counsel on either side as bearing upon this point, none of which will, we believe, when critically examined, be found to

impugn this familiar legal notion, we are quite satisfied with the terse expression of it by the able and learned chief justice of Massachusetts, when applying it, as the organ of his court, to the case of a fire policy, the erroneous application for which had been drawn up for the assured by a director and agent of the company insuring. Shaw, C. J., *Lowell v. Middlesex Fire Ins. Co.* 8 Cush. 127, 133.

At the same time we are also satisfied that the judge who tried this cause, from a misconception of the legal bearing of the testimony of Hopkins upon it, erroneously applied the distinction just spoken of, and misdirected the jury as to the effect of that testimony. It is true, that had the mistake in the application *actually* occurred, either from its being made jointly by Searle and Hopkins when employed in drawing it up, as sworn to by the former, or by Searle alone when engaged in the act of copying another application for the purpose of sending it to the company at the request of the plaintiff or his agent, as it was agreed to be done; according to the testimony of the latter (which was evidently the conception which labored in the mind of the judge), the instruction, thus given by him, would have been perfectly correct. But, as a matter of fact, what Hopkins swore was *agreed* to be done was *not* done, and the mistake did not occur by an erroneous copying of the Hampden application. According to the testimony of this witness, Searle had no authority for sending to the defendants, as he did send, the application for a former insurance effected at their office, only partially corrected to suit the new circumstances, but was to have waited until the application to the Hampden Company had come back to him filled up by Wilson, the plaintiff, and then to have copied and sent that as the plaintiff's application for insurance to the defendant company. When, therefore, he sent to the defendants the application upon which they issued this policy, he derived, if we believe the testimony of Hopkins, no authority from the plaintiff to do the act which has caused this mischief. *He had agreed to act* as the agent of the plaintiff, in copying for transmission to this company the plaintiff's application for insurance to the Hampden Company, and broke his undertaking in that respect, if this testimony be true, with the plaintiff; but this, so far from proving his authority from the plaintiff for sending to the defendants the application which he did send, is the very fact relied upon to prove that he was acting *ultra vires* in so doing.

Now Searle was the agent of the defendants, it is agreed, for receiving and transmitting to them written and printed applications for insurance; and if, as Hopkins swore, he, by mistake, sent this erroneous application to the defendants, without authority from the plaintiff, he committed the error in the performance of a duty for which they had employed him solely as their agent; and hence they must bear the consequences of his mistake or carelessness. The case in this respect may be likened to a case of misdelivery by a carrier's servant; for which the carrier is always held responsible. A case more resembling this than any that was cited at the hearing of this motion, was the case of *Wing v. Harvey*, 27 Eng. L. & Eq. 140, decided in 1854 by the lords justices of the court of appeal, in chancery. That was a claim by Wing, the plaintiff, as assignee of life policies originally issued to one Bennett, his creditor, for the payment of money insured by the Norwich Union Life Insurance Company, upon Bennett's life. The defence was, under a condition of forfeiture contained in the policy, that Bennett had gone to Canada in 1835, and continued to reside there until his death in 1849, without the license of the directors of the insurance society. It being proved that the agent of the society, through whom Bennett had effected his policies, had applied to Wing, the assignee, for premiums due upon the policies after Wing had advised him of Bennett's departure for Canada, and had advised Wing that it would be safe for him, notwithstanding, to pay the premiums, and that Wing had regularly thereafter paid them to that agent, and a succeeding agent of the society, who transmitted them to the head office of the society at Norwich, the lords justices held, that inasmuch as the agents *were agents for the purpose of receiving premiums upon subsisting policies*, their receipts of the premium from Wing after knowledge imparted to them of Bennett's departure and residence in Canada, was a waiver of the condition of forfeiture; and that, whether *they* communicated the fact to the directors of the society or not, the society was bound and estopped by the knowledge, acts, acquiescence, and waiver of their agents. Now, so far as the principle of equitable estoppel upon an insurance company in such a matter is concerned, it can make no difference whether the case be tried at law or in equity, — courts of law applying precisely the same rules of equitable waiver and estoppel in respect to things personal at least, and to contracts about them, as courts of equity.

Our conclusion is, that the judge should have left the case to the jury upon the testimony disclosed, with directions to them to find for the defendants if they believed the testimony of Searle, and for the plaintiff if they believed the testimony of Hopkins. On the ground of misdirection to the jury in matter of law in this particular, this motion must be allowed, and a new trial granted to the plaintiff.

As the remaining grounds of the motion have been fully argued, they may as well be disposed of now for the direction of the parties as well as of the judge who may preside at the new trial.

The first of these in substance is, that the defendants should, notwithstanding the statements of the written application to the contrary, be affected with knowledge of the facts verbally communicated to their agent, Searle, by Hopkins, as he swore, about his, Hopkins's, tenancy of, and running and superintending the plaintiff's mill. Had the question been one of *fraudulent* concealment or misrepresentation; had the agent been the general agent of the defendants to make contracts of insurance binding upon them, or even an agent of limited powers, but to receive and transmit *verbal* communications upon which the defendants were to insure, and the case were one of ordinary representation merely, leaving the question of materiality open, some ground for such a motion might be found in many of the cases cited by the counsel for the plaintiff. But in such a case as this, where the power of the agent is limited to the mere receiving and transmitting a written application to a distant board of directors, upon the basis of which they are to decide whether they will enter into a contract of insurance with the applicant, and upon what terms, considering his description of the risk, and where all this, too, is known to the assured before he receives his policy, it would be violating every principle of law with regard to the admissibility of parol evidence to affect a written contract, and open a door for the practice of the grossest frauds upon insurers, to admit for a moment that such a case is a proper one for the application of the rule that notice to the agent is notice to the principal. In the first place, he is no agent for such a purpose; and again, if he were, the written representation, supposed to be, and which ought to be deliberately made, according to the common principle, waives, repels, and merges all prior mere verbal state-

ments, and establishes itself as the basis, and the only basis of the contract. Forfeiture for breach of condition subsequent stands upon a very different footing from such representations as to existing facts, made the very basis of the contract, where the agent has, by acts done with full knowledge, in the course of and within the scope of his agency, waived the forfeiture. Without repeating the accurate criticism of the cases cited by the counsel for the defendants — made at the hearing of this motion by the counsel for the plaintiff — we are quite satisfied upon the point in question with the rulings made and the reasons given in *Vose v. Eagle Life & Health Ins. Co.* 6 Cush. 42, 49; *Barrett v. Union Mut. Fire Ins. Co.* 7 Cush. 175, 179, 180, 181;¹ *Lowell v. Middlesex Mut. Ins. Co.* 8 Cush. 127, 133;² and *Forbes v. Agawam Mut. Fire Ins. Co.* 9 Cush. 470, 473.³

The last ground for new trial alleged in the motion is, that the judge ruled out evidence offered by the plaintiff to prove that the risk would be less hazardous if the mill or “works” were operated on account of, and superintended by, the tenant Hopkins, because of his greater knowledge and experience in the care of such property, than if operated and superintended by the plaintiff; the purpose of the evidence being to show that the falsity of the answers to questions 19 and 20 in the application, that is, the misrepresentations in these respects, were not material to the risk.

At the hearing of this motion it seemed to be supposed by the counsel on both sides, that the admissibility of the testimony offered might depend somewhat upon the question whether the false answers in question were, technically, warranties or representations. Many cases were cited by the counsel for the defendants to show that where applications or surveys were referred to and embraced in policies, every fact stated in them was a warranty. Certainly they would not be warranties, if termed or treated in the policy as representations, as shown by *Catlin v. Springfield Fire Ins. Co.* 1 Sumn. 435, 443;⁴ *Houghton et al. v. Manufact. Mut. Ins. Co.* 8 Metc. 114, 120;⁵ *Jones Manufacturing Co. v. Manufact. Mut. Fire Ins. Co.* 8 Cush. 82, 84.⁶ And where certain answers and certain plans, surveys, or descriptions in an application, as in the one in question, are expressly made warranties in one place, and the policy declared to be on that ac-

¹ *Ante*, vol. 1, p. 199.² *Ib.* 240.³ *Ib.* 415.⁴ *Ante*, vol. 1, p. 436.⁵ *Ante*, vol. 2, p. 346.⁶ *Ante*, vol. 3, p. 235.

count void, if they are not correct, in another, the implication is strong that the application is, in other respects, to be deemed not a *warranty*, but a representation. If the insurers, by the language they employ in *their* policy, leave a matter of this sort doubtful; if they seem inclined to use ambiguous language upon such a subject, or choose to render the meaning of the policy uncertain with regard to it by inserting clauses contradictory or useless, except upon the idea that they are intended to distinguish in this respect between different parts of, or different answers in the application; it is certainly the duty of the court to construe the policy, with all its appendages, most strongly against them, and to hold the application, or so much of it as is not declared to be warranted, a representation merely. See opinion of Lord St. Leonards in *Anderson v. Fitzgerald*, 24 Eng. L. & Eq. R. 11-16. In some aspects and for some purposes, such a distinction would be material; but we do not see its materiality in the case and to the question now before us; and we do not think it worth while to enter into a consideration of the different clauses of this policy, and of the conditions annexed to it, for the purpose of ascertaining whether the ruling of the judge who tried this cause was, in this respect, correct. We are perfectly satisfied, considering that the questions falsely answered related to things in themselves material for an insurer to know, — that is, *who* occupied, *who* operated this mill, and therefore whose interests were concerned in its safety, *who* superintended or took care of it, — that the parties, by asking and answering questions of this character, are precluded afterwards from agitating their materiality, which they have thus settled for themselves. This rule should especially hold true with regard to so indefinite a matter as the qualifications of persons, not only from knowledge and skill, but from character for honesty and care, to be safe depositaries of the rights and interests of distant insurers, who must be, to a great extent, at the mercy of the assured under a fire policy, as to their causing or preventing losses, or as to honestly stating and settling for them when they have occurred. For many persons, no insurance office who knows them would, upon any terms, take any risk whatsoever; and from others, they would require a higher or a lower premium, graduated by their character for prudence, or even by the circumstances of their business condition; in other words, by the presence or absence of temptation to make,

or of inducements to guard against a loss. "Upon the facts of this case," to use the language of Mr. Justice Fletcher, in delivering the opinion of the supreme court of Massachusetts in *Vose v. Eagle Life & Health Ins. Co.*, before cited, in relation to this very subject, "it is not important whether the proposal or application is considered as a warranty or representation. As a warranty it was so manifestly untrue, and as a representation there was manifestly so material a misrepresentation, that in either view the policy is invalid." 6 Cush. 48.

In the late case of *Anderson v. Fitzgerald*, 24 Eng. L. & Eq. R. 1, which came before the house of lords, on error, from the exchequer chamber in Ireland, the precise question under a life policy was (the policy making the answers to certain questions in the proposal warranties, but not as to questions 21 and 22), whether the judge who tried the cause with a jury misdirected the jury, by instructing them that if they found the answers to questions 21 and 22 *both false and material*, they should find a verdict for the defendants, the insurers. The question was heard in the house of lords before the lord chancellor (Lord Cranworth), Lord Brougham, and Lord St. Leonards, assisted by four judges of the court of exchequer, with Baron Parke at their head, and by six judges from the courts of queen's bench and common pleas. The unanimous opinion of these distinguished jurists was, and they held, reversing the decisions upon this question of the courts of exchequer and exchequer chamber in Ireland, that the direction of the judge to the jury was wrong; and that the questions which he ought to have left to the jury were, *first*, were the answers to the questions false, and *secondly*, were they made in effecting or obtaining the policy. In the opinion of Baron Parke, who had requested time on behalf of the judges to consider, he says for them: "The first question, then, submitted to us is, whether it was necessary for the plaintiff in error to prove on the trial that the above answers or either of them, were or was material as well as false? We are all of opinion that it was not. The question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord Mansfield, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties irrespective of the policy, or meant to be referred to by it. The proviso is clearly part of the express

Construction. — Ambiguity. — Burden of Proof.

contract between the parties, and, on non-compliance with the condition stated in the proviso, the policy is unquestionably void." Higher authority, or more apposite to the question before us, could not be imagined. It will be remarked, too, that if the application in all its parts in this case were not made a warranty, it was made, as in the case just quoted, by the express terms of the policy, "a condition of the policy." As no proof is necessary to prove a condition affixed by the parties to their contract to be material, since they have chosen to affix it, so none can be admitted on the other hand to prove it to be immaterial. This ground for new trial, therefore, totally fails.

A new trial upon the first ground alleged in the assertion is granted, the costs of this motion to abide the event of the suit.

ISRAEL WILSON v. THE HAMPDEN FIRE INSURANCE CO.¹

(Supreme Court, Rhode Island, September Term, 1856.)

Construction. — Ambiguity. — Burden of Proof.

In construing the answers to the interrogatories in a printed application for fire insurance, although the proper meaning of the words used is to be first resorted to, yet the meaning attached by the applicant to them, clearly ascertainable from the connection in which he uses them, is to prevail over their proper meaning. Inaccuracies in the answers to such interrogatories caused by the ambiguity of the interrogatories, taken in their connection with each other, are to be charged to the account of the insurers who prepared the applications.

Where the applicant for insurance against fire on a cotton mill and machinery, to previous questions had answered that the buildings, and machinery, with certain specified exceptions, belonged to one person — himself — and that certain machinery not to be insured in the policy belonged to one A. H., and that "the works" were not operated by the proprietors, but were rented; and in reply to this question, "Are they (the works) immediately superintended by one of the proprietors?" answers "Yes;" the answer is sufficiently verified by the fact that "the works" were superintended by the tenant, A. H., — in common parlance, a "proprietor," as distinguished from his employees, and who actually owned a part of the machinery run in the works, whether the meaning intended to be conveyed or actually conveyed by the answer, under the circumstances be considered.

The burden of proving the breach of a promissory warranty in a policy of fire insurance is not upon the insurers; on the contrary, the burden of proving a compliance therewith is upon the assured; and hence the declaration on a policy for a loss under it should aver the performance of such and all other warranties of the assured, — a requisite of the declaration sufficiently satisfied by a general averment, that all things have happened which it was necessary should happen to entitle the plaintiff to recover the loss.

MOTION for a new trial. This was an action on a fire policy effected by the plaintiff with the defendants, through their agent residing in Providence, who was empowered to receive written applications for insurance, to transmit them to the board of the

company at Springfield, and if they issued policies upon applications thus sent to them, to receive the premiums and deliver the policies to the assured. The policy was dated the 10th day of September, 1855, and insured the plaintiff's "movable machinery contained in a stone and wood factory in Exeter, Rhode Island," to the amount of \$2,500, against loss or damage by fire, from the 13th day of September, 1855, at twelve o'clock at noon, to the 13th day of September, 1856, at twelve o'clock at noon. The policy contained a clause stating that "This insurance is predicated upon an application or survey filed in the office of said insurance company as No. 6779, which application and survey is made part and portion of this policy and warranty on the part of the assured."

The application and survey, thus made a part of the policy, contained twenty-six printed questions, to which answers were made as required, by the plaintiff; of which those only need be here recited upon which the defences of the company turned. They were as follows: —

Question 18. Are the buildings and machinery both owned by the applicants for this insurance? If not, state by whom, and the nature of your interest? *Answer 18.* All are owned by one, except 8 cards, 1 drawing-frame, and about 75 new tin cans, belonging to Alexander S. Hopkins, not to be insured in this policy.

Question 19. Are the works operated on account of the proprietors, or are they rented? *Answer.* Rented.

Question 20. Are they immediately superintended by one of the proprietors? If not, by whom? *Answer.* Yes.

These are recited together as pertaining to the first ground of new trial.

The question and answer out of the evidence relating to which the third ground of new trial arose, were as follows: —

Question 8. Is there a watchman in the mill during the night? Is there a good watch-clock? Is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening? *Answer.* No. Mill entered twice after stopped at night, as late as half-past ten o'clock, to see if everything is safe.

At the trial, which took place in October, at an adjournment of the September term of the supreme court for the county of

Kent, before the chief justice, sitting with a jury at East Greenwich, it was proved that the machinery insured, together with the mill in which it was contained, was totally consumed by fire on the night of the 10th of November, 1855. It was admitted that the mill had not been superintended by the plaintiff who was the sole proprietor of it, but by Alexander S. Hopkins, the tenant; and the other testimony submitted to the jury related, principally, to the question, whether the promissory warranty contained in the above answer to the 8th question of the application and survey had been kept. As enough of this testimony appears in the motion for a new trial, the substance of which is hereafter given, a recital of it here is unnecessary to the understanding of the questions raised, and the points ruled, at the trial.

Under the instructions given by the presiding judge, the value of the property destroyed greatly exceeding the amount insured, the jury returned a verdict for the plaintiff for the sum of \$2,587.50, being the amount insured, with interest after ninety days from notice and proof of loss, according to the conditions of the policy.

A motion for a new trial was thereupon filed by the defendants upon the following grounds: —

First. That the presiding judge “instructed the jury that the word “*proprietors*” in the 20th interrogatory in the application, coupling the same with the 18th and 19th interrogatories, and the answers thereto, might fairly be said to include and mean the *tenant*; and that the jury might consider the answer thereto to be true, it appearing that the tenant was the only superintendent.”

Second. In substance, that upon the refusal of the counsel for the defendants to withdraw the testimony of their agent before put in, that prior to recommending the defendants to execute the policy sued, he inquired the character and standing of the plaintiff, which he found to be good, and that he would not have recommended the continuance of the risk in favor of the former owner, the presiding judge allowed, against objection, the plaintiff to put in testimony, that when first applying for insurance to the agent of the defendants, he informed him who had hired and was to run the mill, as well as the length of the tenancy, and all the circumstances under which the mill was to run; said evi-

dence in reply being admitted solely for the purpose of rebutting any ground for imputing fraudulent or intentional misrepresentation, and for the purpose of contradicting the testimony of the defendants' agent; the judge excluding the same as evidence varying, or tending to vary, the effect of the written application, or of the answers of the plaintiff thereto.

Third. In substance, that the plaintiff's tenant and witness, Alexander S. Hopkins, having, as was contended by the counsel for the defendants, contradicted himself in his testimony given at the trial, as to his customary time, after the policy was effected, of entering the mill when it was stopped at night, for the purpose of seeing that all was safe, in compliance with the promissory warranty contained in the answer of the plaintiff to the 8th question of the application and survey, and being also contradicted therein, as contended, by his statements made at other times, sworn to by witnesses for the defendants, the presiding judge, in his charge, instructed the jury, that the burden of proving the breach of the plaintiff's warranty to examine the mill once every night as late as half-past ten o'clock, was upon the defendants, in order to their defence under the same; and that therefore, so far as proof of the breach of said warranty depended upon the testimony of said Hopkins, if the jury, from the contradictory character of the witness's own testimony, and the contradictions of it by his statements sworn to by others, came to the conclusion that they could put no confidence in it, they should disregard it altogether; that it was not to be taken as an admission made by the plaintiff, but so far as relied upon by the defendants to prove the breach of the warranty, as their testimony relied on by them to prove their defence; and the witness in this respect, and for this purpose, was to be regarded as *their* witness, though produced and sworn by the plaintiff.

To expedite the cause, it was agreed that this motion should be heard by the court when sitting at Providence, and the result entered by the clerk of the court for the county of Kent, as of the September term of the court for that county.

The motion was argued at the September term of the court at Providence, by *Bradley* for the motion, and by *Cozzens*, with whom was *R. W. Greene*, against it.

AMES, C. J. A motion for a new trial has been made in this cause, on the ground that the judge who presided at the trial per-

mitted, notwithstanding objection made, improper testimony to pass to the jury; and also misdirected the jury, as to the construction to be put upon an answer given by the plaintiff to *one* interrogatory put to him on the application upon which the policy was based, and again as to the burden of evidence in relation to the performance of a promise made by the plaintiff in his answer to *another* interrogatory in the application. In giving judgment upon this motion we shall consider, shortly, in the order in which we have named them, these causes, alleged by the defendants why their motion should be granted.

After overruling the unimportant objection to the admission of evidence, the learned judge continued: —

Second. The next cause for new trial alleged is, that the judge misdirected the jury in construing, in its connection, the word “proprietors,” used in the 20th interrogatory of the application, to be broad enough in its meaning to include the tenant of the works concerning the superintendence of which that interrogatory was put, in justification of the truth of the answer of the plaintiff thereto.

In deciding a question of this kind, it by no means follows that the rigid meaning of a word used in an interrogatory will ascertain the meaning conveyed thereby in the question, or, what in such a case as this is quite as important, the meaning actually conveyed in response thereto, in the answer. The notion conveyed by the plaintiff in the answer complained of is the substantial matter here; and although the proper meaning of the words of the question are certainly to be the first resorted to in order to understand the answer, it would be giving the proprieties of language the precedence over its purpose, to allow these to prevail over the obvious meaning conveyed by an uneducated man, clearly ascertainable from what he said, taken in the connection in which he said it. So fully is the good sense and justice of this recognized by the common law, that it requires the whole of a written document, letter, or the like, to be put in evidence, if any part of it is to be used against a party; so that any imperfection, defect, or excess of the language used in it, whether necessary or accidental, may be explained or cured by the context in which it stands, or the purposed qualifications which accompany it. To the construction of no species of document does the spirit of this rule apply with more force than to the application or survey, as it is called, usually

made part of a modern policy of life or fire insurance. Filled with numerous questions, many of them consisting of several clauses, and drawn up with the skill of cross-examining counsel of the first class, printed in fine type, and scattered broadcast by agents among the many little property holders of such a country as ours, who from habit and education are wholly unfitted, without assistance, to disentangle the meaning from the skilfully contrived net-work of questions in which it is involved, the wonder is, not that some contain answers intelligible enough but not consistent with the proprieties of diction, but that so many questions are, in general, so properly answered. When it is considered that every one of the answers to every one of these numerous interrogatories of many clauses is, as in this case, frequently made "a warranty on the part of the assured," and yet that they are responded to by the uneducated and unreflecting, without assistance, every day, all ignorant of the critical position in which they are thus placing themselves, we see reason enough for looking at the substantial meaning intended and conveyed by them, without holding them too strictly to the refinements and proprieties of language. The practice adopted by insurance companies for their own convenience, of putting so many questions in their printed forms in the plural, when if the questions had been put successively and after the answers to the previous questions had been read, the singular would have been adopted, has, as we see in the case before us, a strong tendency to mislead. No doubt if the singular number were adopted in these forms it would have a like tendency; the difficulty growing out of and inhering to the practice, in any form, of putting so many and complex questions, before the previous answers can be known to guide their form, without, as in case of depositions, having an experienced magistrate or commissioner to aid by explanation the respondent. This mode of interrogation is the practice of companies, and these printed forms are prepared by them; and we have the high authority of Lord St. Leonards, in a recent case of a life policy tried on appeal in the house of lords, and in relation to this very species of instrument of insurance companies under the very practice of which we speak, that "if," to quote his own language, "there be any ambiguity in it, it must be taken according to law more strongly against the person who prepared it." *Anderson v. Fitzgerald*, 24 Eng. L. & Eq. R. 11.

Now the matter under this policy stands thus: the applicant, having to previous questions answered, that the *buildings* and machinery both belonged to *one* person, himself, except certain specified machinery which he states *belongs* to Alexander S. Hopkins, and not to be insured in this policy, and having also previously answered that "the works" are not operated on account of "the proprietors," but are rented, is next pursued with the question "are they (the works) immediately superintended by *one* of the *proprietors*?" to which he answers, "Yes;" the fact being, as was proved, that they were superintended by the same Alexander S. Hopkins who rented the works of the applicant, and who was the "proprietor" named in the answer to a previous question, of a part of the machinery operated in those very "works." It is true, as is remarked by the counsel for the defendants, that the questions considered by themselves mark the distinction between "proprietors" and those to whom the buildings are "rented," and that this distinction accords with the proper meaning of the word "proprietors" as laid down in the dictionaries; but it is also true that in common parlance the person who runs a mill is amongst us, though but a tenant, usually spoken of as the "proprietor" of it, to distinguish him from his superintendents and work people, and that when the applicant has just said that he alone *owned* the mill, and another man hired it, and is, notwithstanding, then asked whether it is operated by "one of the proprietors," there being in the *strict* sense, as he has just explained, but *one* proprietor, he might naturally conclude that the word "proprietors," as now repeated, must have been intended to include the tenant, according to an *ordinary* use of it. It is evident that here is an ambiguity, to say the least of it, created by the plural form of the last question continued, notwithstanding it was calculated, considering his former answers, to mislead the respondent, if the strict meaning of the word "proprietors" was intended to be preserved in the question. If this be so, the rule, as we have seen, requires that the meaning of the question be taken most strongly against the defendants who framed it, and who, if misled by the answer, have no right to complain, since they misled the applicant by their mode of putting the questions which elicited it.

But beside this there is a sense in which the answer of the applicant is true, attributing to the word "proprietors" in the 20th

interrogatory of the application its strictly proper meaning, the same which it had and was understood by the applicant to have in the 19th which immediately precedes it. The applicant had already explained, and the fact was proved to be so at the trial, that Alexander S. Hopkins, who was the tenant, owned a part of the machinery in the same mill which contained that insured under this policy, and which was operated along with it as part of the same "works." When, therefore, the applicant was further asked whether "the works" were immediately superintended by "one of the proprietors," he might with entire truth, and with strict propriety in the use of language, answer as he did that they were. It is said by the counsel for the defendants in reply to this view of the matter, that the questions in the application were of course understood and intended to be understood as applying only to the property insured; which in this case could be part only of the movable machinery in this mill. Upon examination, however, it will be found that the questions were neither designed by the company nor understood by the assured to have so limited an application. The 18th question asks if "the buildings" which were not insured under this policy, as well as "the machinery," a part of which only was, are "both owned by the applicants for this insurance? If not, state by whom, and the nature of your interest?" So much for the question indicating the intent of the office to ascertain by it the ownership of other property than that insured. Then look at the answer to it, which shows that the insured rightly understood that it had this wider application. All owned by one, except 8 cards, 1 drawing-frame, and about 75 new tin cans *belonging* to Alexander S. Hopkins, *not to be insured in this policy.*" When, therefore, he was asked in only the question but one succeeding, whether "*the works*" were immediately superintended by *one of the proprietors?*" he might well understand that this question, as well as the 18th, related to other property than that asked to be insured, to wit, to all the property included in "the works" and operated as a part of them, and thus not only truly, but with strict propriety, answer as he did, that they were superintended by one of the "proprietors," that is, by Alexander S. Hopkins, who, as had been before explained, was the proprietor of a part of the machinery operated.

There is another view of this matter which is in our judgment

of special importance, and for that reason the attention of the counsel was particularly directed to it at the argument. The only ground upon which the defendants can fairly object to this or to any other answer to the numerous questions which they put, is not that it is not worded with nice attention to the proprieties of the English language, but that the meaning conveyed by it to them has misled them as to the basis of facts upon which, to use their own language, "this insurance was (is) predicated." The supposition thus made is, however the fact may have been, that the application and survey having been filled up by the applicant, was transmitted to the office of the company at Springfield, Mass., by its agent, and was there laid before the board of directors, as a statement of facts warranted to be true, upon which after due consideration they were to decide whether they would take the risk offered, and if they did, at what premium. Now the substantial question is, did this board, could this board, if as was their duty both to the applicant and the company, they carefully read over the successive questions and answers of this application and survey, have understood that Israel Wilson, who in it told them that he had rented this little mill, and all the machinery in it of which he was the proprietor, nevertheless "immediately superintended" it for his tenant in the sense in which such *superintendence* is agreed to be understood by men accustomed to the use of the ordinary language applied to the management of this species of property? Such an idea so reverses the customary relations between the landlord and tenant, that at least it must have induced them more critically to scan the language employed in the questions and answers of the application to see if it could be the meaning thereby intended to be conveyed, and we are all satisfied that if they had done this, they must have discovered at least, that misled by the ambiguity of the question created by the form in which it occurred after, and in connection with the previous questions and answers, the applicant had understood, as well he might, that the word "proprietors" included the tenant; or, as we rather incline to think, that supposing the question related to all the machinery in the "works," as well that not to be insured as that to be insured under the policy applied for, he intended when he answered that "the works" were immediately superintended by "one of the proprietors," that they were superintended as such small works usually are by the tenant, who, by a

previous answer to a question in the application, was stated to be a proprietor of a part of the machinery operated in the works. Whichever way this is considered, the objection taken to recovery on this ground fails, and this motion, so far as it depends on it, cannot be granted. We have been at this pains to explain the reasons for our coming to a conclusion, which upon reflection it seems very easy to reach, because conscious of disapproving the system of late adopted, of making every answer to the numerous and involved questions in an application for a fire policy, however unimportant, a warranty, we are fearful lest that might be deemed to sway us from our duty by unconsciously leading us to pervert to the injury of a company, which after all in this respect but follows the common example, the intent and import of an instrument which formed the basis of the contract of insurance into which they have entered. Such a wrong to the administration of the only justice we can know, that measured out by law, we estimate as of deeper injury than any which the practice we disapprove of can inflict; and except to give all parties before us fairly and unswervingly the benefit, benign or severe, of the law as applied to their conduct and contracts, we are the masters of none, we are the guardians of none whom the law permits or enables to act or contract as they will for themselves. Considering every answer in this application as the parties have expressly made it, a warranty, we have not asked ourselves how material the answers in question may be to the risk, since that has been already determined by the parties for themselves. *They* have made the truth of each and all of the answers in this application a condition precedent to the right of the assured to recover on this policy, and we have therefore confined ourselves to the humbler office of construing their language, instead of rising to the consideration of the materiality of the facts about which they have chosen to employ it.

The last cause for new trial alleged in this motion is, that the presiding judge, adverting in his charge to the position in which the defence would be left (so far as the testimony of the plaintiff's witness, Alexander S. Hopkins, was relied upon by the defendants to prove the breach of the promissory warranty made by the plaintiff, that the mill should be entered as late as half-past ten every night to see that all was safe), if the testimony of that witness should be rejected, instructed the jury, that

the burden of proving the breach of that warranty was upon the defendants, instead, as he should have done, instructing them that the burden of proving its performance was upon the plaintiff. Such an instruction was calculated, in the position in which the motion discloses that the defence upon this point stood in proof before the jury, materially to injure the defendants therein, and would therefore, if wrong, furnish a sufficient ground for new trial on their motion. We are all satisfied that this instruction was wrong; the judge confounding the distinction, so well taken and applied by the supreme court of Massachusetts, in the late case of *Crowninshield v. Crowninshield*, 2 Gray, 530-532, between what makes out a *prima facie* case, and what shifts the burden of proof, and, what is more radical, the distinction between a promissory warranty of the quality of the thing sold in a contract of sale, and a promissory warranty, like this, in a policy of insurance. In the former case, if, when the seller sues to recover the price, the buyer relies on a breach of the warranty as a total or partial defence, the burden of proof is upon him to show the breach of warranty; for the same reason that it would be, if he sued for breach of the warranty, instead of being permitted, as he is in this country, to avoid circuity of action, to defend himself by means of it in the suit brought against him for the price. *Dorr v. Fisher*, 1 Cush. 271, 274, 275. In such a case, says Chief Justice Shaw, in delivering the opinion of the court, in the case just cited: "It (the warranty) is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor. And notwithstanding such a warranty, or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action." *Ib.* 274. On the contrary, in a contract of insurance, "a warranty," to use the language of Lord Mansfield, "is a condition or a contingency, and unless that be performed there is no contract." *De Hahn v. Hartley*, 1 T. R. 345, 346. This holds true, whether the warranty relate to things past, present, or to come, or is found in a marine, fire, or life policy. The text-books are full of this doctrine, and no case can be found contravening it. 1 Marshall on Ins. 348; Hughes on Ins. 808; 2 Phillips on Ins. 753, 2d ed; 1 Arnould on Ins. 581-584, and cases cited; Angell on Fire & Life Ins. § 142. There is, however, a class of

cases, nearly resembling these, which is apt to be confounded with them ; and an imperfect recollection of which partly caused the erroneous direction in question Where the promissory stipulation is not made a warranty, and the courts are inclined, if they can, to construe them to be representations merely, the proof of the breach of such stipulations is matter of defence only, and the burden of proof rests, of course, upon the defendants. *Catlin v. Springfield Fire Ins. Co.* 1 Sumner, 435, 443 ; *Houghton et al. v. Manufacturers' Mut. Fire Ins. Co.* 8 Metcalf, 114, 120 ; *Underhill v. Agawam Mut. Fire Ins. Co.* 6 Cush. 440, 446 ; *Jones Manufacturing Company v. Manufacturers' Mut. Fire Ins. Co.* 8 Cush. 82, 84. It follows, from the nature of the case, that a declaration upon a policy containing express warranties should always aver the performance of them by the assured, although, as ruled last year by the court of common pleas in England, "the general averment that all things have happened which it was necessary should happen to entitle the plaintiff to be paid, is sufficient." *Bamberger v. The Com. Credit Ass. Co.* 29 Eng. L. & Eq. R. 312. In New York, it seems, that under the old forms of pleading, even this was not deemed necessary. *Hunt v. Hudson River Fire Ins. Co.* 2 Duer, 481. It is clear, however, upon principle, to use the words of Mr. Justice Washington, in *Craig v. The U. S. Ins. Co.* 1 Peters C. C. R. 410, that where the assured has entered into a warranty, he cannot recover against the underwriters "without first averring and proving performance of these stipulations ;" and see 2 Phillips on Ins. 753, 2d ed. ; 2 Arnould on Ins. 1262, 1825. The burden of proving the performance of all warranties made by him rests upon the assured ; and although this burden may be lifted by presumption, merely, as in case of the implied warranty of seaworthiness it is held to be, yet this cannot shift the burden which remains, notwithstanding the *prima facie* case thus made out by the plaintiff, where the law first casts it, to the end of the trial. 1 Arnould on Ins. 686, n. 1, and cases cited.

Upon the ground of misdirection of the judge trying this cause, in the particular last referred to, a new trial must be granted to the defendants ; the plaintiff to have leave to amend his declaration by inserting the general averment of performance above mentioned, and the costs of this motion to abide the event of the suit.

 Keeping Gunpowder. — Habitual Use.

WILLIAM L. LEGGETT vs. THE ÆTNA INSURANCE COMPANY.¹

(Court of Appeals, South Carolina, Fall Term, 1856.)

Keeping Gunpowder. — Habitual Use.

To a valued policy of insurance against fire, on a "stock of goods and merchandise contained in" plaintiff's store, one of the conditions was that "the keeping of gunpowder for sale or on storage, upon or in the premises insured, shall render the policy void:" *Held*, that the keeping of small quantities of gunpowder in kegs, as part of the stock of goods kept for sale, did not vitiate the policy.

Amongst the stipulations of the policy was one, that in case the above mentioned building shall at any time be "appropriated, applied, or used for the purpose of storing or vending therein" certain enumerated articles, "then, so long as the same shall be appropriated, applied, or used, these presents shall cease and be of no force or effect." *Held*, that plaintiff was entitled to recover for a loss by fire of the goods and merchandise insured, although it appeared that a barrel of oil had been temporarily left in a back room of the store, and that near it were some bunches of cotton yarn.

It was part of one of the conditions of the policy that, "if after insurance is effected, the risk shall be increased by any means within the control of the assured, such insurance shall be void and of no effect." *Held*, that the increase of risk contemplated was by something permanent or habitual.

ACTION on a fire policy. The facts appear in the opinion.

WARDLAW, J. There was no direct evidence concerning the origin of the fire. The mass of testimony, much of it contradicted, which the defendant introduced to show circumstances from which the plaintiff's fraudulent agency in the burning might be inferred, has been weighed by the jury, and on the facts of the case the verdict is considered conclusive.

The defendant now holds up the written contract, and insists that the plaintiff's rights have been defeated: first, because gunpowder was kept in the storehouse, and was sometimes sold from wooden kegs; and second, because oil was in the storehouse at the time of the burning, and near to it was some cotton yarn.

By the first of the conditions of insurance it was required (after mention of what applications for the insurance of buildings should specify) that the application for insurance should specify, "in case of goods and merchandise, whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special rates: and a false description by the assured of a building or its contents shall render absolutely void a policy issuing upon such description." In other parts of the appendix to the policy, lists are given of goods denominated not hazardous, hazardous, and extra hazardous, and of those subject to special rates, the not hazardous being such as are usually kept in dry goods stores, including coffee, &c. But

¹ 10 Rich. (Law) 202.

neither of the lists contains gunpowder. The fifth of the conditions contains this: "The keeping of gunpowder for sale or on storage, upon or in the premises insured, or the lighting of the same by camphene or spirit gas, without written permission in the policy, shall render it void."

The first thought naturally is to look at the plaintiff's application. But it has not been produced. The insurance seems to have been effected at Fayetteville, N. C., by an agent of the plaintiff applying to an agent of the defendant keeping an office there; the former deposes that, as he believes, he made a written application; the latter deposes that he can find no application of the plaintiff on the file, and believes none was made in writing, but feels sure that nothing special was contained in the application that was made. The policy, however, declares that the company, in consideration of thirty dollars to them paid, "do insure William L. Leggett against loss or damage by fire to the amount of two thousand dollars on his stock of goods and merchandise, contained in his store in Marlborough District, S. C., as particularly described in his written application on file of this date, which is hereby made a part of this policy." It is then contradictory of the defendant's earnest appeal to the letter of the contract, to say that there was no written application, or that its contents have been shown to be either "goods such as are usually kept in dry goods stores," or goods such as were in the storehouse without any special description.

If we assume that the application described the goods as they really were, powder was mentioned; or if we assume the description to have been that of an ordinary stock in a country store, then the evidence, sustained by the verdict under the instructions that were given to the jury, shows that gunpowder was included. But adopting the latter assumption, the defendant says that the keeping of gunpowder was forbidden by the policy. How? The condition, concerning what the application in case of goods and merchandise shall contain, did not require the mention of gunpowder, for it is not enumerated as either hazardous, extra hazardous, or subject to special rate. *Duncan v. Sun Fire Ins. Co.* 6 Wend. 495. It was not kept "upon or in the premises insured," for the premises (by which, as the context shows, was meant some building) were not insured at all. This strictness is conformable to what has been urged on the part of the

 Keeping Gunpowder.—Habitual Use.

insurers, and is justified by the general rule which requires all conditions to be construed strongly against those for whose benefit they were reserved. If, however, the storehouse had been insured along with an ordinary assortment of goods and merchandise, such as are usually kept in a country store, we would enter into inquiries which this case does not demand, before we would hold that the retailing within the storehouse of gunpowder, kept in no large quantity, necessarily made void an insurance under the fifth condition above recited. See *Moadinger v. Mechanics' Fire Ins. Co.* 2 Hall N. Y. 490; ¹ *Langdon v. N. Y. Eq. Fire Ins. Co.* 2 Hall, 226; 6 Wend. 628.

Concerning the oil, the defendant refers to a stipulation in the policy, "that in case the above mentioned building shall, during the continuance of this insurance, be appropriated, applied, or used to and for the purpose of storing or vending therein any of the articles, goods, or merchandise, in the conditions aforesaid, denominated hazardous, extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed to by this company in writing and added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no effect; and this policy is made and accepted, with reference to the conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of parties, in all cases not herein otherwise specially provided for." Reference is also had to the latter part of the first condition. "If, after insurance is effected, the risk shall be increased by any means within the control of the assured, such insurance shall be void and of no effect."

The complaint made in the second ground of appeal seems to be, that the judge did not, in his summing up, specially advert to the danger which was occasioned by the oil situated as it was. That omission might have been easily corrected by a suggestion from the counsel of the defendant. The oil and cotton were, however, substantially embraced in the instructions that were given to the jury, whether their being in the store may be considered in reference either to the stipulation in the policy, or to the above recited clause in the first condition.

It was not suggested on the circuit that the fire did actually

¹ *Ante*, vol. 1, p. 285.

proceed from the oil and cotton, for there was no evidence of their contact or very dangerous proximity, and such suggestion would have weakened the main defence, that the plaintiff had himself caused the fire by means far more speedy and certain. But the breach of condition made by the oil was intimated on the circuit, and has been pressed here.

The express stipulation in the policy itself is by its terms confined to the case of a building insured, and in reference to that, forbids the appropriation, or chief use of the building, for any of the forbidden purposes, not the incidental keeping of small quantities of the forbidden articles for retail along with a general stock of goods. See the case of *Langdon* above cited; 3 Kent's Com. 373; 5 Hill N. Y. 10.

If a barrel of oil temporarily kept in the house suspended the policy, under the stipulation, then according to the same reasoning the keeping of any of the following articles (and, perhaps, any of many others) would have the same effect: any china, or earthen, or glassware, or looking-glasses, or window-glass, or millinery, or flax, or wool, or saltpetre, or sulphur, or tallow, or straw hats, or matches, or pictures, or confectionery, or jewelry, or perfumery, or stationery, or spirituous liquors, or spirits of turpentine, or varnish. Without any of these articles a country store would hardly be deemed to have a sufficient assortment.

The increase of risk contemplated in the first condition is the increase by something permanent or habitual. *Shaw v. Robberds*, 6 Adolp. & Ell. 75; ¹ 33 Eng. C. L. R. 12; 31 Maine, 223; 20 Conn. 139.

In *Dobson v. Sotheby et al.* 1 Moody & Malk. 90; ² 22 E. C. L. 260, a barn that was insured required tarring, and for the purpose of tarring it a fire was lighted inside, and a tar barrel brought in. In the absence of the assured, and by the negligence of his servant, the tar boiled over and took fire, in consequence of which the building was burned down. Lord Tenterden held the insurers liable, understanding the condition against fire and hazardous goods as forbidding only the habitual use of fire or ordinary deposit of hazardous goods, not their occasional introduction for a temporary purpose connected with the occupation of the premises. It is obvious that in the instructions which were given to the jury in the case we are considering, there was

¹ *Ante*, vol. 1, p. 621.

² *Ib.* p. 199.

What Policy covers.

an error, of which the plaintiff, in another event of the case, might have had reason to complain. Gross negligence is equivalent to evil design; but ordinary negligence is the very thing against which insurance is mainly intended to guard; and even if the loss should have proceeded from it, the right of the insured is not thereby affected. In this policy the certificate of loss is required to exclude the suspicion of fraud, but not of negligence. If greasy cotton had been put into a corner of the store by the plaintiff himself, in ignorance of the danger thus occasioned, or in inattention to it, but without evil design, and combustion had thence ensued, the case would not have been less strong for the plaintiff than it now is. The motion is dismissed.

O'NEALL, WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

GEORGE L. FULLAM *vs.* NEW YORK UNION INSURANCE CO.¹
(Supreme Court, Massachusetts, October Term, 1856.) *Limitation Clause.*

A condition of insurance to which a stock policy is made subject, that no suit in law or equity shall be sustained thereon unless commenced within six months after the loss, is binding on the assured, and bars a suit commenced after that time; although neither the contract is made nor the suit brought in the state where the company is established, and the conditions of insurance allow the assured thirty days to furnish proofs of loss, and provide that the loss shall not be payable until ninety days after the filing of the proofs of loss and of an estimate thereof by appraisers chosen by the parties; if there is no evidence of unreasonable delay or waiver of the condition of the insurers.

FITCHBURG RAILROAD COMPANY *vs.* CHARLESTOWN MUTUAL
FIRE INSURANCE CO.²

(Supreme Court, Massachusetts, October Term, 1856.)

What Policy covers.

A policy to a railroad corporation "on their road furniture, consisting of locomotive engines, cars of all descriptions, and snow-ploughs, on the line of their road, and in actual use, but not in machine or repair shops," covers cars left in the ordinary course of the business of the corporation upon an iron track connected with the railroad, though not owned nor controlled by the corporation.

ACTION of contract on a policy of insurance against fire, issued to the plaintiffs "on their road furniture, consisting of locomotive engines, cars of all descriptions, and snow-ploughs, on the line of their road, and in actual use, but not in machine or repair shops."

¹ 7 Gray, 61.

² 7 Gray, 64.

What Policy covers.

The application (which was expressly made a part of the policy) contained a similar description of the property; and several questions and answers, including these: "Where is the property situated?" Answer. "Boston to Fitchburg, and branches this side of Fitchburg." It also stipulated that its statements were "a full, just, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as material to the risk."

The case was submitted to the decision of the court upon the following facts: The owners and occupants of a wharf in Charlestown situated on the line of the Charlestown Branch Railroad, a road connecting with the Fitchburg Railroad, and owned and run by the plaintiffs under St. 1846, c. 21, had laid the whole length of the wharf an iron track in the manner of a railroad, for the purpose of conveniently receiving and shipping ice. The owners of the wharf had the exclusive control and management thereof. It was usual to leave cars, which came down loaded with ice, on the wharf over night, to be unloaded by the occupants of the wharf, and be taken up again the next day. The cars, for injury to which this action was brought, were drawn from Fresh Pond over the Fitchburg and Charlestown Branch Railroads, and left for one night on the track at the extreme end of the wharf, four hundred and forty feet from the line of the Charlestown Branch Railroad, with no agent or servant of the plaintiffs in charge of them, and near a shed, used to store shavings and sawdust for packing ice by the occupants of the wharf. The next morning, the fire originated in this shed, and was thence communicated to these cars. The shed was an extra hazardous risk, which the defendants had refused to insure.

DEWEY, J. The present case, though not one free from difficulty, must be decided by the view to be taken of the intent of the parties in the contract of insurance. The question is, whether the property destroyed by the fire was embraced within the terms of the policy, giving them a reasonable construction. The property insured is thus described in the policy: "Their road furniture, consisting of locomotive engines, cars of all descriptions, and snow-ploughs, on the line of their road, and in actual use, but not in machine or repair shops."

It is said that the description excludes cars not at the moment

Hazardous Articles. — Rags.

of the loss on the Fitchburg Railroad or its Charlestown branch, and that the words, "the line of their road," mean exclusively to confine the policy to cars while on these particular roads, in distinction from any spurs used in connection with them. This we think is too narrow a construction, looking at the nature of the property insured and the language of the policy. It seems more consonant to the probable purpose of the parties to understand the policy as an insurance upon cars, &c., in actual use upon their road. These cars, as we understand, were in such use, daily passing over the Fitchburg Railroad or its Charlestown branch, carrying ice, and, for convenience of delivery, passing upon a railway constructed for this purpose by the proprietors of the wharf. Such spurs seem to have been authorized by St. 1836, c. 187, the act creating the Charlestown Branch Railroad, and legalized as branches that might use the Charlestown road. Still they were private property.

But it being in the usual course of business of the plaintiffs to use their cars in conveying ice over their own road, and delivering it at the wharf in the manner stated, this entire line became by adoption, to all practical purposes, their line of road, and the cars were in actual use upon the line of their road at the time of the loss by fire. We do not understand that the insurance was limited to cars in motion, but to cars in actual service, fit for use, and in daily use doing the business of the company, those "in machine or repair shops" being only excluded. "Snow-ploughs" were insured; but it is presumed that they would be only at particular seasons and for short periods in use on the railroad track.

If this view is correct, no question can arise as to any forfeiture of the policy by increase of risk; as no change of circumstances or other use than originally contemplated by the parties to the policy is shown.

Judgment for the plaintiffs.

GEORGE W. MACOMBER vs. HOWARD FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, October Term, 1856).

Hazardous Articles. — Rags.

Under a policy of insurance against fire on a stock in trade, described in the application (which is made a part of the policy) as consisting of "dry goods, groceries, hardware, crockery, glass, and wooden ware, Britannia and tin ware, stoves of various kinds, and

¹ 7 Gray, 257.

Hazardous Articles. — Rags.

various other wares and merchandise," which provides that a use of the premises for the purpose of keeping or storing any of the articles denominated hazardous in the conditions annexed to the policy, "which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for," shall avoid the policy, unless otherwise specially provided for, and in which conditions "groceries with any hazardous articles," "rags," and several of the articles mentioned in the application are enumerated as hazardous, is avoided by the keeping of rags as part of the stock; although it is usual for shopkeepers, having a general stock of goods like that insured, to keep rags in the same manner.

ACTION of contract on a policy of insurance issued by a stock company, upon the plaintiff's stock in trade, fixtures, furniture, and tools, contained in a certain wooden building, and described in the application, which was made a part of the policy and warranty on the part of the assured. That application contained, in answer to a request to "state the character and kind of property to be insured," the following statement: "Dry goods, groceries, hardware, crockery, glass, and wooden ware, Britannia and tin ware, stoves of various kinds, and various other wares and merchandise."

By the policy, "it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall, at any time after the making and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, used, or occupied, these presents shall cease, and be of no force or effect; and it is moreover declared, that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for."

Annexed to the policy were four "classes of hazards," denominated, respectively, "not hazardous," "hazardous," "extra hazardous," and "memorandum of special hazards, upon which

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special rates of premium will be charged," the two first of which were these: "Goods not hazardous are to be insured at the rate of the building in which they are contained, and are such as are usually kept in dry goods stores; including coffee, flour, linen, indigo, potash, rice, spices, sugars, teas, threshed grain, and other articles not combustible." "The following trades and occupations, goods, wares, and merchandise are denominated hazardous, and are to be charged ten cents per \$100 in addition to the rate of the building in which they are contained, namely, basket sellers, cotton in bales, coppersmiths, china, earthenware, or glass ware, or plate glass in packages, boxes, or casks, groceries with any hazardous articles, hardware, wooden ware, rags," and many others.

Among the "conditions of insurance," also annexed to the policy, were the following: "In relation to the insurance of goods and merchandise, the application must state whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special rates." "If, after insurance is effected upon any building or goods, in this office, either by the original policy or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured, or if such buildings or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

At the trial, the facts necessary to make out a *prima facie* case for the plaintiff were proved or admitted. One ground of defence relied on was that a part of the plaintiff's stock consisted of rags, which was admitted to be the fact. But it was proved "that it is usual for country stores, having a general stock of goods like the plaintiff's, to keep and dispose of rags in the same manner that the plaintiff did." Dewey, J., reserved for the consideration of the full court the question whether, upon these facts, the defence could be maintained.

BIGELOW, J. The provisions in the policy declared on, and the conditions of insurance to which the agreements of the parties therein refer, are the same as those which passed under the consideration of the court in *Lee v. Howard Fire Ins. Co.* 3 Gray, 583. The principles there laid down are decisive of this case. It appears by the evidence that, among the articles stored in the

Period of Insurance. — Mistake. — Waiver of Information. — Evidence.

building in which the property insured was kept, a quantity of rags was included. These, being enumerated as a "hazardous" article in the conditions of insurance, could not be kept on the premises without a direct violation of the express terms of the policy, except by the consent in writing of the defendants; and if so kept without such consent, the policy was thereby rendered void. Rags, though specially enumerated as a hazardous article in the conditions of insurance, are not mentioned in the application for insurance, although other hazardous articles are there specified. It is not sufficient that the term groceries was used in the application; nor that it is usual to keep rags in a country store. If the description in the application had contained the words, "groceries with any hazardous articles," it might have been sufficient; because it would then have given the insurers notice that articles deemed hazardous were to be kept, in addition to those ordinarily comprehended within the meaning of the word groceries. Upon the application as it stands, the defendants had a right to suppose that nothing besides groceries, and the articles specially named in the application, was to be kept or stored in the premises. The plaintiff had no right, under his policy, to accumulate articles of the same class of hazards on his premises, not named in the application, without the consent of the defendants. *Lee v. Howard Fire Ins. Co.* 3 Gray, 592.

The effect of the evidence to prove a usage to keep rags in a country store, was to control the written agreement of the parties, by which it appears that rags were not included in any generic term or description, but were to be specially named, if intended to be included in the policy. The evidence was therefore incompetent.

Plaintiff nonsuit.

LIBERTY HALL ASSOCIATION *vs.* HOUSATONIC MUTUAL FIRE INSURANCE Co.¹ (Supreme Court, Massachusetts, October Term, 1856.) *Period of Insurance. — Mistake. — Waiver of Information. — Evidence.*

A policy expressed to be "from the first of August, 1854, to the first of August, 1854, may be shown by reference to the indorsements made by the insurers on the back of the policy, to the application which is made part of the policy, and to the amount of the premium and deposit note, to be an insurance for five years from the first of August, 1854. A waiver of the right to any information upon the matters inquired of in one of the interrogatories to an applicant for insurance may be inferred from the issuing a policy upon an application in which this interrogatory is unanswered; although the applicant has

¹ 7 Gray, 261.

Fraud. — Arson. — Proof of.

answered in the negative another interrogatory whether "there are any other circumstances affecting the risk."

Evidence that a policy, intended as a substitute for a policy issued by another company (to whose business these insurers had succeeded) upon a previous application, was sent by these insurers, with a blank application and deposit note, to the agent of the assured, who retained the new policy, and signed the application and deposit note in blank, and returned them to the insurers, and did not see them again until they were produced by the insurers, with the blanks filled, at the trial of an action on the policy, will not warrant the inference that the assured was not responsible for the answers contained in the application, except to the extent to which the insurers, in filling the blanks, exceeded the implied authority conferred upon them by the assured by so returning the blank application.

JAMES JENKINS vs. QUINCY MUTUAL FIRE INSURANCE CO.¹
(Supreme Court, Massachusetts, October Term, 1856.) *Representations. — Incumbrances.*

Representations in answer to questions, in an application to a mutual insurance company for insurance on buildings, that the premises are owned by the applicant, and are unincumbered, when in fact he is only a mortgagee, avoid the policy under a by-law of the company (to which the policy and application are made subject) providing that unless the applicant shall make a true representation of his title and interest in the policy, and also of all incumbrances, and the amount and nature thereof, the policy shall be void; and parol evidence that the true state of the title was disclosed to the company before they agreed to insure, and that the answers were then written in by their agents, before the application was signed by the assured, is inadmissible.

THE FARMERS' MUTUAL FIRE INSURANCE CO. vs. WILLIAM MARSHALL.² (Supreme Court, Vermont, November Term, 1856.)
Agent. — Application by. — Assessments.

P., acting as agent for a mutual insurance company, obtained from the defendant an application for insurance, which the company approved and issued a policy thereon. Subsequently the company took a bond from P. dated prior to the application, reciting that he was their agent, and binding him to the faithful discharge of his duties as such: *Held*, that these acts amounted to a ratification of his agency in taking the application.

The oral representations of an agent of a mutual insurance company that the insured will never be called upon to pay any part of his premium note cannot control the stipulation in the note itself.

MURRAY McCONNEL vs. THE DELAWARE MUTUAL SAFETY INSURANCE CO.³ (Supreme Court, Illinois, December Term, 1856.)
Fraud. — Arson. — Proof of.

If the insured causes the fire by which his goods were destroyed, and by false representation recovers from the insurers, he may be compelled to refund what has been paid him. Where a cause of action, or a defence, is based upon a charge of crime, to sustain either, the proof must be full and satisfactory.

In cases of insurance if it is necessary to establish facts which amount to a crime, the same degree of proof is required as in an indictment for the same offence.

¹ 7 Gray, 370.² 29 Vt. 23.³ 18 Ill. R. 228.

GEORGE W. BATTLES vs. YORK COUNTY MUTUAL FIRE INSURANCE Co.¹

(Supreme Court, Maine, Oxford, 1856.)

Misrepresentation. — Incumbrances. — By other Parties.

A misrepresentation in an application to a mutual fire insurance company that there is no incumbrance upon the property, avoids the policy, although such incumbrance has been placed upon the property by another than the insured.

RICE, J. Section 11 of the defendants' charter reads as follows: "Said company may make insurance for any term not exceeding six years; and any policy of insurance issued by said company, signed by the president, and countersigned by the secretary, shall be deemed valid and binding on said company in all cases where the assured had a title in fee simple, unincumbered, to the building, buildings, or property insured, and to the land covered by said buildings; but if the assured has a less estate therein, or if the property or premises are incumbered, policies shall be void, unless the true title of the assured and the incumbrances on the same are expressed therein." By the terms of the policy, the application, which is in writing and signed by the plaintiff, is made part of the policy; and such application is to be taken as part of the contract of insurance, in the same manner it would be if incorporated into the policy itself. *Philbrook v. New England M. F. Ins. Co.* 37 Maine, 187;² *Williams v. Same*, 31 Maine, 219.³ In such case, all the material statements in such application are changed from representations into warranties. *Burritt v. The Saratoga Co. M. F. Ins. Co.* 5 Hill, 188;⁴ 31 Maine, 219.

The 7th section of the defendants' charter gives them a lien upon the property insured, for the sum of the deposit note and the cost which may occur in collecting the same, which lien continues during the existence of the policy and the liability of the assured therein, notwithstanding any transfer or alienation.

The 11th interrogatory in the plaintiff's application is as follows: "Is the property incumbered? If so, how much, and to whom?" The answer is, "Mortgaged for \$1,100 to Wm. Cressey."

A want of truth in a representation is fatal or not to the in-

¹ 41 Maine, 208.² *Ante*, vol. 3, p. 671.³ *Ib.* p. 171.⁴ *Ante*, vol. 2, p. 276.

insurance, as it happens to be material or immaterial to the risk undertaken; but when the thing is warranted to be of a particular nature or description, it must be exactly as it is represented to be, otherwise the policy will be void, and there is no contract. Angell on Ins. § 147.

It is sometimes the practice of companies, who insure against fire, to make inquiries of the assured, in some form, concerning all matters which are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by conditions annexed to the policy, and sometimes by requiring the applicant to state particular facts, in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all matters brought to his notice. *Burritt v. Saratoga Co. M. F. Ins. Co.* 5 Hill, 188.

A warranty by the assured, in relation to the existence of a particular fact, must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material or not. It would be more proper to say that the parties have agreed to the materiality of the thing warranted, and that agreement precludes all inquiry on that subject. 5 Hill, 188.

If the application contain an interrogatory whose aim is to ascertain whether there be an incumbrance on the property proposed to be insured, and the answer do not disclose the extent of that incumbrance, the policy will be void. *Lochner v. Home Mutual Ins. Co.* 17 Mo. 247.¹

The insured must represent truly his interest in the property insured or his policy will be void. *Brown v. Williams & Thomson M. F. Ins. Co. Trustees*, 28 Maine, 252.²

A representation made to a mutual fire insurance company, in answer to their questions, by one applying for insurance on a building against fire, that there is no incumbrance thereon, is a material representation, which if false avoids the policy, although the company be established by the laws of another state, and may not therefore have a lien on the property insured. *Davenport v. New England M. F. Ins. Co.* 6 Cush. 340; ³ *Packard et al. v. Agawam M. F. Ins. Co.* 2 Gray, 334.

Nor is the result changed if the incumbrance has been placed

¹ *Ante*, vol. 3, p. 445.

² *Ante*, vol. 2, p. 693.

³ *Ante*, vol. 3, p. 129.

upon the property by a party other than the assured. *Warner v. Middlesex Mutual Assurance Co.* 21 Conn. 444.¹

The case finds that at the time of the application the property insured was not only incumbered by the mortgage to Cressey, disclosed by the plaintiff, but was also under mortgage to Sydenham Bridgham for twelve hundred dollars, which fact was well known to the plaintiff.

But it is contended that the existence of the Bridgham mortgage is wholly immaterial, as Cressey had agreed to apply the payments from the plaintiff, as fast as made, to the extinguishment of the Bridgham mortgage, and had actually left the plaintiff's notes and mortgage in the hands of the witness Andrews for that purpose. We think this answer cannot avail, because the mortgage of the plaintiff to Cressey was not so large by one hundred dollars as was the mortgage from Cressey to Bridgham, so that, if it had been duly assigned and appropriated in payment, it would not have discharged the Bridgham mortgage by one hundred dollars.

Should it be suggested that the Cressey mortgage, as subsequently enlarged, was sufficient to pay the Bridgham mortgage, the answer is, that increase was made in fraud of the rights of the defendants, who occupy the position of subsequent purchasers, or incumbrancers, and against whom that *increase* is absolutely void, if indeed it would not, of itself, avoid the policy.

At the argument much stress was laid upon the fact, that in the offer by the defendants' counsel to prove that the property was overvalued, for the purpose of reducing the damages, should the plaintiff be entitled to recover, they did not contend that there was any actual fraud, but insisted that the facts show a legal fraud. This proposition was confined to the question of damages, and cannot in any way affect the questions which have already been considered.

From these considerations, being of the opinion that the action cannot be maintained, it becomes immaterial to examine the rule of damages laid down by the presiding judge, or to determine whether the evidence upon that point was admissible or otherwise.

A nonsuit must be entered.

¹ *Ante*, vol. 3, p. 346.

Increase of Risk. — Entire Policy.

OLIVER BRAGDON & wife *vs.* APPLETON MUTUAL FIRE INSURANCE COMPANY.¹ (Supreme Court, Maine, Kennebec, 1856.)
Delivery of Policy.

If a policy has been duly executed and notice thereof given to the insured, the contract is complete without an actual delivery of the policy.

TRUSTEES OF THE FIRE ASSOCIATION OF PHILADELPHIA *vs.* WILLIAMSON.²

(Supreme Court, Pennsylvania, 1856.)

Increase of Risk. — Entire Policy.

The conditions attached to a policy of insurance are as much a part of it as if incorporated into the instrument itself.

Where three adjoining houses were insured in one policy, for a specified sum on each, and one of them, occupied as a shoe store, was afterwards, without the knowledge or consent of the insurers, changed into a grocery store, in which gunpowder was kept, and from an explosion of which all the houses were injured, the conditions annexed to the policy requiring groceries and gunpowder to be specified and pay a higher rate of premium: *Held*, that the contract was entire, and that, there could be no recovery for the injury to any of the houses, although the owner did not know that the tenant kept gunpowder in the house.

CERTIFICATE from the court of *nisi prius*. The facts of the case appear in the opinion of the court.

The opinion of the court was delivered by

KNOX, J. This was an action of covenant upon a policy of insurance made by the Trustees of the Fire Association of Philadelphia to Mary Hyneman, and assigned to the plaintiff.

By the policy declared upon Mary Hyneman was insured against loss by fire upon three adjoining stone buildings, the sum of \$666.66½ upon each house.

At the time of the insurance the lower stories were occupied as stores, one as a grocery and dry goods store, one as a shoe store, and one as a millinery store. Subsequently the shoe store was changed to a dry goods, hardware, and grocery store. Amongst the articles kept in this store was a keg or part of a keg of powder, which was placed for safety in the cellar of the kitchen, nearly under the stove, with the head of the cask taken out. The accident, by which the loss was occasioned, occurred in April, 1850, and may as well be stated in the words of the tenant, Henry Brown.

“My boy” (says the witness) “was making paper bags in the

¹ 42 Maine, 259.

² 26 Penn. St. 196.

Increase of Risk. — Entire Policy.

back store, near the partition door; he took them into the kitchen to dry; there was a stove in the kitchen. I was sweeping out the store; fire took place about one or two o'clock, after dinner. I did not see the fire when it began. I was struck dumb. When I came to, the kitchen and carpet were on fire. The wood-work was on fire. It took place at the stove. The powder exploded, destroyed the kitchen of my house and the two adjoining." It is apparent from this testimony that the loss was occasioned by the keg of powder being placed, as the witness said, for safety in the cellar, within two or three feet of the kitchen stove.

One of the conditions annexed to the policy is in the words following: —

"Persons exercising any of the trades or occupations herein mentioned, or making use of the premises insured for any other business that will increase the risk, or for storing or keeping any of the articles, or desirous of insuring the risks herein enumerated, must make a declaration to that effect that it may be inserted in the policy, and pay such extra premium on account thereof as the trustees may demand therefor; on failure thereof this policy shall be void and of no effect." In the annexed schedule amongst the prohibited occupations is that of *grocer*, and in enumerating the forbidden articles to be kept, *gunpowder* is mentioned.

Under this stipulation it was contended by the defendants, upon the trial at *nisi prius*, that the policy was void, because one of the buildings insured, and the one where the explosion took place, was changed in its occupancy from a millinery to a grocery store, and that powder was kept therein without the assent of the insurers; and further, that the violation of the agreement in this respect was the sole cause of the injury to the buildings by the explosion and the fire.

The positions assumed by the plaintiff upon the trial at *nisi prius* and in the argument in this court are stated by his counsel thus: —

1st. "That the houses being separately insured, each in the sum of \$666.66 $\frac{2}{3}$, the plaintiff was entitled to recover of defendants separate damages for the loss sustained on each house.

2d. "That the houses being rented to separate tenants, if one of them should, without the knowledge of the landlord, keep pow-

Increase of Risk. — Entire Policy.

der, and a fire be thereby caused, which produced injury to all the houses, the owner is not thereby debarred from the recovery for the loss and damage to the buildings.

8d. "That if one of the tenants kept powder in the house occupied by him, and a fire took place in the house so occupied which produced injury and loss to the other two houses, the plaintiff would not forfeit his right for the loss sustained by the fire on the other two houses."

Under the instructions of the court a verdict was rendered for the defendants.

Two questions are presented upon this record. 1st. Did the change in the occupancy of one of the buildings from a shoe to a dry goods, grocery, and hardware store, avoid the entire policy, or any part of it?

2d. Suppose the loss was occasioned by an explosion of powder kept by the tenant without the landlord's knowledge, can there be a recovery for any part of the loss?

It is perfectly well settled that the conditions attached to a policy are part of the policy, as much so as if incorporated in the instrument itself. 1 Hen. Black. 254; 6 T. R. 710; 6 Cowen, 576. Taking the policy altogether then, it was to be void and of no effect if the insured should use the premises for carrying on the occupation of grocer, or for keeping gunpowder without making a declaration to that effect, and having it inserted in the policy, and paying such extra premium as might be demanded.

It is a conceded fact that one of the stores was changed in its occupancy from a shoe to a dry goods and grocery store; and it was clearly established upon the trial that powder was kept in the cellar of this store, and that by its explosion the entire injury was occasioned. There may be some question whether the mere change in the business carried on in one of the stores would of itself avoid the policy; but when we consider that not only did this change take place, but that the loss was caused by keeping a prohibited article, and that the insurance company neither gave its permission nor had notice of the fact that the building was used for keeping groceries, and that gunpowder was also kept, the case seems to be free from difficulty. Although three buildings were insured, the contract was an entirety, and as the cause of the injury to the three buildings was identical, it is of no consequence whatever in which one of the three it had its

Subsequent Insurance. — Waiver of. — Proportionate Loss.

origin. Neither is it material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was, that it should not be kept without permission, and it was his business to see that his tenants did not violate the contract in this respect. Forbidden articles in a policy of insurance would be of no practical importance if the effect of keeping them depended upon the landlord's knowledge that they were kept by his tenant. The same point was decided by the Supreme Court of New York, in *Duncan v. Sun Fire Ins. Co.* 6 Wendell, 489, where Chief Justice Savage, in delivering the opinion of the court, held that "the landlord's knowledge that the tenant kept gunpowder was immaterial," and that, "if the buildings were used in a manner prohibited by the policy, the liability of the defendants ceased."

Upon the whole case we see no ground for disturbing the judgment entered at *nisi prius*. *Judgment affirmed.*

LYCOMING MUTUAL INSURANCE CO. vs. SLOCKBOWER.¹

(Supreme Court, Pennsylvania, 1856.)

Subsequent Insurance. — Waiver of. — Proportionate Loss.

If a policy provides "that the aggregate amount insured in this and other companies shall not exceed two thirds of the estimated cash value," such insurance, in violation of the agreement, renders the policy void.

If the company has notice of the additional insurance, and elects not to avoid the policy, but treats it as in full force, it is a waiver of the right to resist a recovery upon that ground.

The implied waiver arising from such acts of the insurance company will not deprive it of the benefit of a stipulation that in the event of other insurances, only a proportionate part of the amount insured shall be demanded on the policy.

THE case is stated in the opinion.

The opinion of the court was delivered by

KNOX, J. In the policy of insurance upon which this action was brought, it is expressly stipulated "that in all cases of other insurance upon the property insured, whether prior or subsequent to the date of the policy, in case of loss or damage by fire, the insured shall not be entitled to demand and recover on the policy any greater proportion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property ;" and further, "that the aggregate

¹ 26 Penn. St. 199.

Subsequent Insurance. — Waiver of. — Proportionate Loss.

amount insured in this and other companies, on the above mentioned property, shall not exceed two thirds of the estimated cash value."

The estimated cash value mentioned in the policy was five hundred dollars. The amount of the insurance was three hundred and thirty-three dollars, — two thirds of the estimated value, — so that any further insurance, being in violation of the agreement, would render nugatory the policy. It is said, however, that the company had notice of the additional insurance, and elected not to avoid the policy, but treated it as in full force, by continuing thereafter to make and collect assessments upon it. This branch of the charge is entirely unobjectionable. The question was fairly submitted to the jury, and found against the company. But there was error in permitting the jury to find, under the evidence, that the company was liable for the whole amount insured in the policy. The implied waiver arising from the assessments, and from what was said by the agent, would apply only to that part of the contract which declared that only two thirds of the estimated value should be insured, leaving in full force the stipulation that, in the event of other insurances, only a proportionate part of the amount insured should be demanded from the Lycoming Company.

Now, as there was no evidence given that the loss sustained was greater than the estimated value of the property, which was five hundred dollars, the plaintiff was only entitled to recover upon the policy in suit that proportion of the said sum of five hundred dollars which the amount insured in the policy, viz., three hundred and thirty-three dollars, bore to the whole amount insured on the property, viz., six hundred and thirty-three dollars. The amount would be ascertained thus: If \$633 gave \$500, what would \$333 give? The answer is, \$263.03. After the fact was found by the jury, that the company assented to the additional insurance, the verdict should have been for \$263.03. And as we have discovered no other error in the case, we will affirm the judgment if the plaintiff will release the excess, otherwise it must be reversed.

Judgment reversed, and venire de novo awarded, unless the plaintiff, within thirty days after receiving notice hereof, files a release for all of the judgment but \$263.03, and interest from the rendition of the verdict, in which case judgment is to be entered, affirmed for said amount with costs.

Warranty or Representation. — "*Clerk sleeps in the Store.*"

FRISBIE vs. FAYETTE MUTUAL INSURANCE CO.¹

(Supreme Court, Pennsylvania, 1856.)

Warranty or Representation. — "Clerk sleeps in the Store."

The words, "clerk sleeps in the store," in an application for insurance, copied into the policy, are mere description of occupancy, and not a warranty for the future.

Whether a statement in a policy shall be taken as a warranty is a question of interpretation, to be ascertained as in other contracts.

The rule seems to be, that such representations in a policy are construed to be warranties, when it is apparent that they had in themselves or in the view of the parties a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them. If the court cannot say so, then they are treated as representations, and left to the jury.

LOWRIE, J. This suit is founded on a policy on merchandise, in a house which is thus described, "a frame plastered store-house," &c.

For several months prior to the loss, no one slept in the store, and hence the question is, do the words, "clerk sleeps in the store," constitute a warranty for the future, or are they mere matter of description of the mode in which the building was occupied. The court below regarded them as a warranty for the future, and that position has been very skilfully maintained here, but we are not convinced.

These words have not the form of a warranty; they speak of present time and not for the future, and are placed in no connection that leads to a belief that they were intended for a future state of affairs. They stand in the midst of a description of the merchandise insured, and of the house in which they were; and when we notice, in addition, that one question in such cases always is, How is the house occupied? we cannot avoid the inclination to believe that these words were inserted as description and not as warranty.

It is said that words of warranty are always inserted in the policy, which means in the body or by reference, and representations never. But neither of these propositions is universally true, for many warranties are implied, and the description of the subject matter insured is very commonly attended by mere representations concerning the condition of things, and these representations are often, by reference, made part of the policy, though actually written only in the application. 2 Hatt. 632; 16 Wend. 481.

¹ 27 Penn. St. 325.

Warranty or Representation. — "Clerk sleeps in the Store."

Whether a statement shall be taken as a warranty is a mere question of interpretation, to be ascertained in policies of insurance just as in other contracts. If it relates to a fact that we can know, judicially, to increase the risk, as in the numerous cases of the false assumption of a neutral national character for a ship in time of war, then it is treated as a warranty. And so it is where it is apparent that the statements refer to the precautions taken to prevent fire; 8 Metc. 114; but even they are entitled to a liberal interpretation, and call only for a substantial performance according to the customs of trade and business. 1 Moody & M. 90; 1 Hall, 226; 2 Ib. 589; 6 Wend. 623; 25 Ib. 374.

Here it does not expressly appear that the clerk was to sleep in the store as a precaution against fire, and it is not otherwise obvious that that was the purpose of sleeping there. As he might need fire and candle there, it may be that his sleeping there would increase the risk, or be so regarded. It may be a mere license. 1 Sumn. C. C. R. 435. We may illustrate the impossibility of the arbitrary construction contended for by changing the sentence and making it read, "Clerk cooks his victuals in the store." It would hardly be insisted that he should continue to do so, for this would increase the risk. Or let it read, "A tavern is kept in a part of the house." This would not be regarded as a warranty that he should continue to do so; for the by-laws show that the company regarded such a use of the house as adding to the risk.

The rule seems to be that such representations in or part of the policy are construed to be warranties, when it appeared to the court that they must have had, in themselves or in the view of the parties, a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them. If the court cannot say so, then they are treated as representations, and it is left to the jury to say whether or not they are material misrepresentations, tending to mislead and actually misleading the insurers.

Judgment reversed, and new trial awarded.

Agent's Powers. — Mistake in Answer.

THE BRITISH AMERICAN INSURANCE COMPANY vs. JOSEPH.¹

(Queen's Bench, Montreal, January, 1857.) *What Policy covers.*

An insurance against fire effected upon a certain quantity of coal covers not only the coals deposited at the time but those deposited since, and covers also the risk arising from the spontaneous combustion of such coal.

CINQUE MARS *et al.* vs. THE EQUITABLE INSURANCE COMPANY.²

(Queen's Bench, Hilary Term, 1857.) *Proof of Loss. — Condition Precedent.*

One condition of a policy was that the assured should, within a month after the loss, deliver in as particular an account thereof as the nature of the case would admit of, and make proof of the same by production of his books of account and other proper vouchers, and give such further explanation thereof as should be necessary, and that until this was done the loss should not be payable. The company had required certain invoices, which the plaintiffs refused to produce, though it was in their power to do so; but the jury, being satisfied on other evidence that the loss had been actually sustained, found in favor of the plaintiffs. *Held*, that not having complied with the condition in the policy, the plaintiffs could not recover, and a new trial was granted.

MALLEABLE IRON WORKS vs. PHOENIX INSURANCE COMPANY.³

(Supreme Court, Connecticut, February Term, 1857.)

Agent's Powers. — Mistake in Answer.

It is within the scope of the company's agent's powers to explain the questions of the application, and to decide for himself and the *bond fide* applicant what is a satisfactory answer, and how the answer should be applied to the subject.

The agent having incorrectly, and by mistake, answered one of the questions on his own supposed knowledge, and the applicant not knowing the fact: *held*, That the contract was not affected thereby, especially as the court regarded the statement as unimportant.

ELLSWORTH, J. The petitioners ask, by their bill, that the superior court will reform a certain policy of insurance, and order the respondents to pay \$5,000, which they say is due them, for the loss of their iron works. The error which the court is asked to correct consists in the answer, as it now stands, to the 16th interrogatory in the proposals. That answer says that there was a watch upon the premises until twelve o'clock P. M., and likewise a watch-clock. This answer, or one just like it, we held in the late case of the Glendale Woollen Company, 21 Conn. 19 (being expressly made a part of the policy), to be in the nature of a warranty, and that, if untrue, it would render the policy void. Fearing this result at law in a suit on the policy as it now

¹ 9 Lower Canada R. 448.

² 15 Upper Canada R. 143; S. C. Ib. 246.

³ 25 Conn. 465.

reads, the petitioners seek a correction and reformation of this part of the policy. They say the policy is incorrect, inasmuch as it does not express the contract as it was made; that the answer in question was not given as it was written and is now understood; and that such was the course pursued by the agent of the respondents, at the time that the petitioners ought not to be injured by the mistake, and the respondents ought not to object to the correction.

On the one hand, it is insisted that the insurance company have made no other contract of insurance than the one in writing, and if Houghton, their agent in Bridgeport, has made another and different one, he made it for himself, and had no authority to make it for the company. On the other hand, it is insisted that Houghton was the general agent of the company for all the purposes of insurance in Bridgeport, and could bind the company in the premises as fully as any general agent whatever; and that, at any rate, if he was clothed with only a limited authority to bind the company, such limitation cannot affect third persons like themselves, who, without any knowledge of such limitation, have obtained insurance through such agent.

These respective claims have led counsel to examine many cases in the books, upon the point to what extent insurance agents abroad can be held to represent the companies for which they act; when they bind their principals, and when they only bind themselves. Here is a field of wide extent for doubt and litigation, and many cases may be found illustrating the rule as it is claimed on the one side and on the other; and yet, after all, this case resolves itself into a question of fact more than of law, as is established and very well illustrated in the case of *Sheldon et al. v. The Hartford Insurance Company*, 22 Conn. 235,¹ and the case of *Boughton v. The A. M. L. Ins. Co.*, tried on the present circuit at New Haven.

The court do not deem it important to travel over this entire field, since a majority of us are satisfied, taking the facts as they are found, that Houghton did, in this instance, sufficiently represent the company, when he obtained proposals from the petitioners and remitted them to his principals at Hartford, to bind them, by his agreement or explanations given at the time. *Dunlop's Paley on Agency*, 192, 200; *Sandford v. Handy*, 23 Wend.

¹ *Ante*, vol. 3, p. 550.

260; *Nelson v. Cowing*, 6 Hill, 336; Story on Agency, § 184; *Devendorf v. Beardsley*, 23 Barb. 600.

It is found that, about the 1st day of July, 1854, the insurance company appointed Houghton to be their agent, with power, among other things, to receive and forward applications for insurance, and for that purpose they furnished him with printed blank proposals, of which the present is one, containing the proper questions to be answered by the applicant. With this list of interrogatories Houghton applied to Mr. Sturges, the petitioner's manager and agent, to induce him to get his company's works insured in the office of the respondents. In reading the interrogatories over to Mr. Sturges, when he came to the 16th, Mr. Sturges replied, "No watch on the premises," and it was so entered by Mr. Houghton. Soon after, Mr. Sturges added, "We have a man who watches our annealing premises, and his duty requires him to be there at night from nine o'clock to twelve, but not all the time; but during these hours he must come in; he is not a watchman for the building, but will be likely to see if anything is wrong about the buildings, and when the furnaces are run, he is obliged to be there." Upon this, Houghton observed that he should consider that this man was a watchman until twelve o'clock, and Sturges replied, "he did not know how it would be considered, that he left the matter to Houghton," who thereupon erased the word "No," and wrote "Watchman on the premises till twelve o'clock." We think this interpretation or conclusion, if not an agreement by Houghton (it being an essential part of the proposals and the very groundwork of the insurance to be obtained), was within the authority given to him as the respondents' agent, when he was intrusted with those printed blanks, in order to perfect applications for insurance. He was expected to make use of just this list of questions, and to give to the applicant for insurance any necessary information or explanation touching the meaning of the proposals. The questions on this paper are very numerous and somewhat indefinite, and to answer them intelligently and fairly must often require some information and preliminary understanding. We think there must be an incidental power in the agent, adequate to the explanation of the description of property which is to be insured, or the meaning of words and phrases, and the application of answers to the subject matter. We do not say that an insurance agent is of

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course a general agent with no limitation, but only that he is, in certain cases, clothed with an incidental power to perfect that which is committed to his care. The agent was to obtain and forward a perfect application. It was within the sphere of his duty to explain the questions and decide for himself and the *bond fide* applicant, what was a satisfactory answer, and how the answer should be applied to the subject. In such a case, the agent cannot be said to make the insurance himself, but his principals do it at the home office, obtaining only through him the necessary information. Suppose the secretary of the company had visited Bridgeport to solicit insurance, and among others had called on Mr. Sturges, and handed him these questions to be answered, and having made himself familiar with the premises of the petitioners, had agreed that the man who watches the annealing shop should be considered and held a watch on the premises until twelve o'clock, and had himself explained and filled out the proposals as Houghton did, — would not the company be concluded? We think they would.

Let us examine and see if in all fairness and justice a local agent is not clothed with such incidental power. The 14th question is, "How are the several stories occupied?" A full and exact answer to this question might require a lengthy and complex recital of facts. Cannot the agent agree to an abridged answer which shall be held to be sufficient? In answering some of the interrogatories in the paper, it may not be easy to state exactly what the facts are and how they would be understood if answered. In order to get the risk may not the agent explain and agree how the thing shall be considered to be, keeping always within the limits of the power which he is to exercise? The 17th question is, "Are there casks in each loft?" May not the agent explain this as equivalent to tubs and cisterns? The 18th question is, "Is smoking or drinking of spirituous liquors allowed on the premises?" Now what are the premises exactly? Cannot the agent agree how it shall be considered, or must this be left an open question, or no insurance be had without the hazard of a lawsuit? The 19th question is, "Are the buildings and machinery both owned by the applicant, and is there any other person interested in the property?" These questions are sometimes not so easily answered of a certainty. May not the agent agree what on the whole is a satisfactory answer to them? The same may be

said of several other questions. If agents, who are furnished with exact and printed blanks, are not to be allowed to say a word by way of information or explanation, when fairly and honestly attending to their appropriate business, which shall attach to the contract of insurance and bind the company, there is great danger that injustice will be done to the honest and confiding applicant, and the sooner it is known that the agent only is bound in such instances, the better for the community. Here the question was, what was to be understood by the answer "a watch on the premises." The facts were truly stated to the agent, who was appealed to to say how these facts should be considered, and he decided that they amounted to a watch, or should be held to be so, and now in fairness and justice the company should be bound by that conclusion of Mr. Houghton.

As to the watch-clock it is found, strange as it may seem, that when Mr. Houghton read to Mr. Sturges the 16th question, he did not read anything about the clock, but that Mr. Houghton put that answer in himself, because he saw a clock of that character, as he thought, standing in the room. Assuming this, then, we pass over this part of the answer as comparatively unimportant, for we do not perceive that it was made a part of the proposal for insurance, except by sheer mistake, and at best is not material if the matter of the watch itself is to be held as we have stated.

We are persuaded that not unfrequently insurance companies are sufferers from carelessness, unfairness, and craft on the part of the insured, and there may well be jealousy and distrust when it is asked to reform the contract after the loss has taken place. Were we investigating the alleged mistake ourselves, we should proceed with much caution, and require clear and ample evidence before we should yield assent in such a case. But a case may be made out. We know mistakes do occur which are not discovered until there is an occasion to seek redress on the policy. A majority of the court feel constrained to decide, upon the facts established in the case before us, that there was a clear and palpable mistake or misunderstanding, and that the policy must be reformed.

We take this occasion, however, to say that there are but few institutions more conducive to the safety and prosperity of the people than insurance companies when well conducted, as we believe they are in this community. They should be fostered and sustained by an equal and impartial administration of justice when

Certificate of Magistrate.

brought in conflict with persons who claim indemnity upon contracts of insurance. There should be no prejudice against them, as is sometimes the case, for protecting and defending themselves against what they believe are unfounded and fraudulent claims; and so on the other hand they should know that there is danger from the multiplication and rivalry of agents in every city, town, and village throughout the land, some of whom are inexperienced and not always as careful and exact as they should be. Agents should never obtain insurances for the company without authority, nor be allowed to hold themselves out by advertisements, notices, or a course of conduct as possessing general powers, when their powers are only limited and special. Herein is great danger that injustice will be done to persons obtaining insurance who are inexperienced in the business, and place full confidence in the word of an insurance agent, accredited as he is by his public appointment.

For the reasons herein assigned, we are of opinion that the plaintiffs are entitled to the relief for which they ask, and so we advise the superior court that the policy should be reformed and a decree be passed that the plaintiffs recover the five thousand dollars and interest.

In this opinion HINMAN, J., concurred. STORES, C. J., dissented.

Decree for petitioners.

DAFOE vs. THE JOHNSTOWN DISTRICT MUTUAL INSURANCE Co.¹ (Common Pleas, Upper Canada, Easter Term, 1857.) *Avoidance of Policy. — Ratification.*

The plaintiff insured with the defendants on a policy, containing a condition avoiding the same if any double insurance should subsist without the defendants' consent. The plaintiff's father, without plaintiff's directions, paid the premium for an assurance on part of the same premises with another company, but no policy was issued until after a fire had consumed the premises, and the plaintiff received the insurance money on the second policy.

Held: 1st. That an insurance had in fact been effected with the second company within the terms of the condition contained in the policy issued by the defendants. 2d. That the plaintiff, having taken the benefit of such assurance, had thereby avoided the policy issued by the defendants.

MOODY vs. ÆTNA INSURANCE Co.² (Supreme Court, Nova Scotia, Easter Term, 1857.) *Certificate of Magistrate.*

When one of the conditions of a policy requires a certificate from the magistrate most contiguous to the place where the fire occurred, stating such fire to have been accidental,

¹ 7 Up. Can. C. P. 55.

² Thompson's (Nova Scotia) Rep. 173.

Misrepresentation. — Assignment.

&c., the obtaining such a certificate is a condition precedent to his right to claim for any loss. A certificate, signed by a magistrate ten miles distant, where there are others within a mile of the fire, will not be sufficient.

BOWDITCH MUTUAL FIRE INSURANCE CO. vs. ISAAC WINSLOW & others.¹

(Supreme Court, Massachusetts, March Term, 1857.)

Misrepresentation. — Assignment.

An application to a mutual fire insurance company for insurance on buildings contained the following question and answer: "State whether or not incumbered, to whom, and to what amount?" "Mortgaged for \$2,000 on the buildings, land, &c.; value, \$7,000;" and concluded with an agreement of the applicant "that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk; and in case of insurance he holds himself bound by the act of incorporation and by-laws of the company." The policy was also made subject to the provisions and conditions of the by-laws; and one of the by-laws provided that the policy should be void, unless the true title of the assured should be expressed in the application. The policy also expressed the intention of the company to rely on their lien on the interest of the insured in the buildings and the land under the same. At the time of the application the land on which these buildings stood, and a larger piece of land, owned by the same person, but separated by a court laid out between them by the owner, were both subject to a mortgage for \$2,000 to J. S., and to another mortgage for \$800 to another party; and the value of the first piece of land and buildings was \$7,000. The assured afterwards indorsed upon the policy an assignment reciting his "having mortgaged the property within mentioned to J. S.," and assigning the policy to him as collateral security, and the company assented in writing to this assignment. *Held*, that the failure to disclose the mortgage for \$800, in the original application, avoided the policy in the hands of the assignee.

WRIT OF REVIEW. The original action was assumpsit upon a policy of insurance, dated June 16, 1847, by which the plaintiffs in review insured Joseph Morrill \$1,600 upon his soap and candle shop, fixtures, stock, and tools, in Roxbury, "subject to the provisions and conditions of the charter and by-laws of said corporation, and the lien on the interest of the person insured in any building covered by this policy, and the land under the same," which lien the company expressed in the policy their intention to rely on, to secure the payment of assessments.

Indorsed upon the policy was the following assignment: "Having mortgaged the property, real and personal, within mentioned, to Isaac Winslow & Sons, merchants of Boston, I hereby assign to them or their assigns the within policy, to hold as collateral security for the performance of the condition of said mortgage. Dated at Boston, July 16th, 1847. Joseph Morrill.

"The directors consent. John T. Burnham, secretary."

¹ 8 Gray, 38. See *ante*, p. 1.

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Among the by-laws were the following: "Art. 9. If the insured shall neglect for the space of ten days, when personally called on, or after notice in writing left at his last and usual place of abode or business, to pay any assessment, the risk of the company shall be suspended till the same is paid."

"Art. 11. When any property insured shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors to be cancelled; but if the grantee or alienee have the policy assigned to him, he may, upon application to the directors within thirty days next after such alienation, on giving proper security, have the same ratified and continued in force for his benefit, with all the rights, and subject to all the liabilities, to which the original party insured was entitled and subjected: provided, that such alienation shall not affect the rights of any person to whom the policy shall be payable, or be assigned as collateral security, if such person shall have assigned a premium note with the assured, or shall give such security as the directors require."

"Art. 17. Any policy issued by this company shall be void unless the true title of the assured be expressed in the proposal or application for insurance."

"Art. 19. The applicant for insurance shall make a true representation of the property on which he requests insurance, so far as concerns the risk and value thereof, and of his title and interest therein."

The application (which was made part of the policy) contained, among others, the following question and answer: "State whether or not incumbered, to whom, and to what amount?" Answer: "Mortgaged for \$2,000 on the buildings, land, &c. — value \$7,000." And the application concluded with the following clause: "The said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk; and in case of insurance he holds himself bound by the act of incorporation and by-laws of said company."

The parties submitted the case to the court upon a statement of facts, of which the policy, assignment, charter and by-laws,

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and application were made parts, and the material part of the residue of which was as follows : —

“ At the time of the application for insurance, the premises were owned by Joseph Morrill, and were subject to a mortgage to the plaintiffs for \$2,000, and also to an earlier mortgage to the Traders' Bank for \$800. But both these mortgages covered four lots of land, two on the northwesterly side of High Street Court, containing 3291½ feet, and two on the opposite side of said court, containing 4260½ feet, entirely separated by said court from the two lots first mentioned. The buildings insured stood on the first two lots only, and were built after the making of the mortgage to the Traders' Bank, and before the making of the other mortgage ; and the value of said two lots and buildings thereon was \$7,000. The four lots have never been conveyed separately, but have always been owned together, and originally constituted one lot, through which High Street Court was laid out by the owner before either of said mortgages was made. The mortgage to the Traders' Bank remained in force till the time of the fire, and under it the bank took possession for the purpose of foreclosure after the making of the policy.”

“ The directors of the company did not, either at or since the time of assenting to the assignment of the policy to the defendants in review, claim of them any premium note or other security, and the said defendants have never given any such note or security.

“ More than ten days before the fire, an assessment was laid, and notice thereof given to Morrill, and he agreed to pay it, if the agent of the company would call upon him on a certain day, which happened to be the day on the night of which the fire occurred. He called accordingly, and did not find Morrill. That night the fire happened. The next morning Morrill paid the assessment. The defendants in review did not know of the assessment, and were never asked to pay it.

“ If, on the foregoing facts, a jury would be warranted in finding a verdict for the defendants in review, in this action, brought in their names, judgment is to be rendered for them and the case referred to an assessor to settle the amount of damages ; otherwise, judgment to be entered for the plaintiffs in review, and the former judgment reversed.”

DEWEY, J. Assuming that by force of the assignment to the

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Winslows by Morrill, with the assent thereto of the plaintiffs in review, the action was properly brought in the name of the Winslows, the further inquiry is as to the sufficiency of the defence to the original action. This is placed upon two grounds: first, the false representation of Morrill in his application for a policy as to the extent of the incumbrances upon the property; secondly, a failure on the part of Morrill to pay an assessment upon his policy within the time specified in the by-law, whereby the policy was forfeited and the company discharged from further liability. As to the second ground of defence, it arises upon facts happening after the assignment of the policy to the Winslows; and it is contended on their behalf that the Winslows are not properly chargeable therefor, the neglect being that of Morrill only, and there not having been any demand upon them for the payment of the assessment. Whether this position can be maintained, we have not found it necessary particularly to consider; for, whatever may be the rule of law as to the effect of a violation of the by-laws or stipulations in the policy, after the assignment by Morrill, we suppose no doubt can exist as to the right of the insurance company to show that this policy was defeated by reason of misrepresentations of the assured made in his original application for the policy. This assignment transferred the policy of Morrill only. It did not profess to create a new policy. The Winslows assumed no responsibility to the insurance company, gave no new deposit note to the company, nor any guaranty of Morrill's note; in fact, did nothing more than to succeed to Morrill's right and interest in the policy, whatever those might be. The question is, virtually, whether as a policy to Morrill there exists a valid defence to it.

It now appears that there was in the original application of Morrill a material misrepresentation as to the extent of the incumbrances upon the property. In answer to the direct inquiries as to whom and to what amount it was mortgaged, it was stated to be mortgaged for two thousand dollars. It was in fact mortgaged not only for the two thousand dollars, but in a distinct mortgage for the further sum of eight hundred dollars. This false statement as to the incumbrances, in answer to a direct question, under the repeated decisions of this court, and as it seems also to have been held in reference to this particular case, upon the hearing of the petition for review, renders the pol-

icy invalid. *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray, 431,¹ and cases cited. It was invalid originally in the hands of Morrill, and equally so in the hands of the party claiming under him.

In answer to this it is now urged that after the assignment to the Winslows this objection was obviated, as the assignment recites that "having mortgaged the property within mentioned to Isaac Winslow & Sons, I hereby assign to them or their assigns the within policy to hold as collateral security for the performance of the condition of said mortgage." It is true that after this transfer to the Winslows, the policy was held by the persons who were the mortgagees in the two thousand dollar mortgage. Except as to those authorized to receive the avails of this policy in case of loss, there was no other outstanding mortgage than the eight hundred dollar mortgage to the Traders' Bank. But we do not see how this changes the aspect of the case, or removes the objection. The recital as to the mortgage to the Winslows was only a restatement of what had been stated in the original application, and the assignment of the policy did not discharge that incumbrance or lessen the whole amount of incumbrances on the property insured. As already remarked, the Winslows did not by this indorsement take a new policy as mortgagees, but a transfer of Morrill's interest in the policy he had obtained.

It is further urged that the falsity of the representations of Morrill ought not to affect the policy, unless material to the risk, and that the value of the property insured was so large, that the omission of the eight hundred dollar mortgage was not material to the risk. But this is no sufficient answer, as the party applying for the policy was bound, in answering the interrogatories, to answer truly, and having made a false statement in this respect he has thereby rendered the policy of no effect. This seems to us to have been distinctly ruled in the former decision of the court in this case. 3 Gray, 432. We see nothing in the present aspect of this case to lead us to change the opinion there expressed, and the result is therefore that the original action against the company cannot be maintained, and there must be

Judgment for the plaintiffs in review.

¹ *Ante*, p. 1.

Assignee. — Alienation. — Assent.

JOSIAH Q. LORING vs. MANUFACTURERS' INSURANCE CO.¹

(Supreme Court, Massachusetts, March Term, 1857.)

Assignee. — Alienation. — Assent.

A mortgagee of real estate, to whom a policy of insurance thereon is made payable in case of loss is not the assignee of the policy, and is affected by subsequent acts of the assured.

A policy of insurance, made to the owner of a mill, "upon his interest, being one half" thereof, provided that if the property should be sold or conveyed, in whole or in part, the policy should become void, but that the policy "might continue for the benefit of such purchaser, if the company give their assent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy." The assured afterwards obtained another policy from the same company on "his interest, being three tenths" of the same mill; and then sold the whole property, and assigned the second policy to the purchaser by an indorsement thereon, which recited that he had "sold the within insured property" to him, and was assented to in writing by the company. *Held*, that this assent was not a sufficient certificate of the fact of sale, to continue the first policy in force; and that oral evidence that the sale of the whole property was disclosed to the company before their assent to the indorsement upon the second policy, was inadmissible to support an action on the first policy.

DEWEY, J. This is an action on a policy of insurance made on the 11th of June, 1853, to Charles Beaumont, in the sum of four thousand dollars, upon "his interest, being one half of the wooden steam saw-mill situated in Hampden, Maine, formerly called the Mitchell mill." The plaintiff, at the date of the policy, had a mortgage on an undivided half of the mill. Indorsed on this policy was the following order, signed by Beaumont, and assented to in writing by the defendants' secretary: "June 12th 1853. In case of loss, pay the within to Josiah Q. Loring, Esq., to secure his mortgage." The mill having been destroyed by fire within the period for which the insurance was effected, and the payment in case of loss having been, by this written order, indorsed on the policy, directed to be made to the plaintiff, and assented to by the defendants, if nothing further was shown, this action would be maintained.

The defendants then urge in their defence, that this policy is wholly void, and that they are discharged from all liability thereon, the policy being subject to a condition set forth on the face of it, "that if the property insured shall be sold or conveyed, in whole or in part, the risk shall cease, and the policy shall become void." It appears by the facts stated in the report of the case, that on the 8th of July, 1853, Beaumont conveyed to Daniel B. Hinckley by deed of quitclaim all his interest in the

¹ 8 Gray, 28.

Assignee. — Alienation. — Assent.

saw-mill, thus parting with all his interest in the property insured by this policy. This fact is admitted, and, if uncontrolled by the further facts in the case, is of course fatal to the plaintiff's right to recover in the present action. This policy was not assigned to the plaintiff, nor did it become an insurance on his interest as mortgagee, but the plaintiff had a mere written order to pay to him such sum as should become payable to Beaumont thereon. Such was the legal effect of the transfer of this policy, as made by Beaumont. *Hale v. Mechanics' Mutual Fire Ins. Co.* 6 Gray, 169. The plaintiff has, therefore, to meet the case of a sale by Beaumont, and to control the effect of such sale as defeating this policy.

The plaintiff insists that he has a good and sufficient answer to this, upon the facts in the case, and under the provision in the policy, that in case of a sale of the property insured "the policy may continue for the benefit of such purchaser, if this company give their assent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy." And the further question is, whether the policy was, after the sale by Beaumont, continued in force under this provision. It will be seen that it might have been done in two modes :

1st. By an indorsement on this policy of the assent of the defendants to continue the same after the sale, for the benefit of the purchaser. But no such indorsement is found on this policy; the only indorsement thereon being the order already stated, assented to in writing by the company. This was previous to the sale to Hinckley, relied upon to defeat the policy, and has no allusion to such sale. It is therefore entirely insufficient as an indorsement on the policy of the assent of the defendants to continue such policy after the sale to Hinckley.

2d. If that consent of the company is shown in any legal form, it is in the other prescribed mode, namely, "by a certificate of the fact." This necessarily implies a written document signed by the defendants or their agent, or adopted by them, assenting to the continuance of the policy after the sale, and made in reference to the fact that such sale had taken place. Has any competent evidence been produced by the plaintiff of such certificate having been made?

This opens the inquiry as to the proceedings of these parties in relation to other policies made by the defendants to Beaumont,

Assignee. — Alienation. — Assent.

as to the same steam saw-mill, and particularly that of the 18th of June, 1853, for \$2,400, upon "his interest, being three tenths of the wooden steam saw-mill, situated in Hampden, Maine, formerly called the Mitchell mill." On this policy are the following indorsements, each signed by Beaumont, and assented to by the defendants' secretary: "18th June, 1853. In case of loss, pay one thousand dollars of the within to M. P. Sawyer, Esq., to cover mortgage." "July 8th, 1853. Having sold the within named property to Daniel B. Hinckley, of Bangor, I hereby assign and transfer to him the within policy, and in case of loss under the same, this company will please pay the same to him, first reserving the right of M. P. Sawyer to receive one thousand dollars."

This second indorsement on the policy of the 18th of June, it will be seen, constituted a full assent on the part of the defendants to continue that policy after the sale by Beaumont. As to the liability of the defendants upon that policy, no question is raised by them. The point in dispute here is, whether this indorsement on the policy of the 18th of June operates as an assent to the continuance of the policy of the 11th of June on a distinct interest in the same saw-mill? Waiving other difficulties in the case, the question first arises as to what property is described in the indorsement on the policy of the 18th of June. The language is, "having sold the within insured property to Daniel B. Hinckley." Looking at the mere question of identity of property here described as sold to Hinckley, the inquiry would be what property is described as sold? Is it three tenths of the saw-mill, or the whole saw-mill? That must be settled, as it would seem, by reference to the policy on which the indorsement is made. It is said to be "the within insured property." Upon turning to the policy, the property insured in the policy was only three tenths of the steam saw-mill. That was all that was embraced in "the within insured property," and when the sale to Hinckley is stated, it is thus limited therefore, and the continuance of that policy, and assent thereto, are alone signified. Whether considering the effect of this indorsement either as a question of notice or of sale, or assent thereto, we can only read it as a recital of a sale of three tenths of the steam saw-mill. The language is limited to that, and we can go no further than to give it its natural and obvious construction.

Whether, if it could be read as a notice of the sale of the whole, such notice, without assent of the defendants to continue the policy as to the other portion previously insured, could avail, would certainly present a serious and probably insuperable difficulty; as it is the assent of the defendants to the continuance of the policy, after they are notified of the sale, that continues the policy for the benefit of the purchaser. There is nothing anywhere to signify the assent of the defendants to continue any other policy than that of the 18th of June, which was upon a distinct three tenths of the saw-mill. In the opinion of the court, this recital of the sale, and assent to a continuance of the policy, must be restricted to the three tenths of the saw-mill insured in that policy; which of course excludes the one half of the saw-mill insured by the previous policy, on which this suit is brought, and the only one with which the plaintiff has any connection or interest. Upon the paper documents and proofs resulting therefrom, the plaintiff has failed to show that the defendants assented to the continuance of the policy of the 11th of June.

The plaintiff then proposes to show by parol evidence that the defendants, at the time of the making of the indorsement on the policy of the 18th of June, in fact had notice that Beaumont had conveyed all his interest in the entire saw-mill to Hinckley, and that the policy of the 11th of June, and that of the 18th of June, were both presented and assented to, as to their respective indorsements, at the same time. This fact of knowledge of the sale of the whole interest is denied by the defendants, and evidence is offered on their part tending to rebut the plaintiff's evidence, and also to disprove the fact of the policy of the 11th of June having been presented to them at the time when their assent to a continuance was entered on the policy of the 18th of June. If these facts thus relied upon by the plaintiff, to show knowledge by the defendants of the sale of the entire saw-mill to Hinckley at the time of making the indorsement of the 8th of July, upon the policy of the 18th of June, were material, it was agreed by the parties that the evidence upon that point should be submitted to a jury. But in our opinion such evidence would be incompetent to show the fact of assent to the continuance of the policy of the 11th of June, after the sale to Hinckley. The defendants had the right to stipulate, for their greater security

Subsequent Insurance.

against the errors of treacherous memory, or the greater evils of false oral statements by witnesses, that the evidence of such assent should be wholly in writing, either indorsed on the policy, or by a written certificate issued by them. The assured being a party thereto is bound by that provision in the policy; and the plaintiff, in seeking to enforce payment for a loss under this policy, must show the assent to a continuance of the policy, after the sale to Beaumont, in the manner stipulated in the policy, "by a certificate of the fact, or by indorsement on the policy." Numerous cases might be cited to this effect, but the law is too well settled to require it. Upon the ground taken by the defendants, they have maintained their defence, and are not legally liable to this action.

Judgment for the defendants.

JEFFERSON KIMBALL & others vs. HOWARD FIRE INSURANCE Co.¹

(Supreme Court, Massachusetts, March Term, 1857.)

Subsequent Insurance.

Upon the face of a policy were printed provisions that in case the assured already had other insurance on the property, not notified to the company and mentioned in the policy, this policy should be void; and that if subsequent insurance should be obtained, and not notified to the company and indorsed upon the policy, the policy should cease. *Held*, that a clause inserted in writing upon the face of the policy, in these words, "Other insurances permitted without notice until required," applied to prior as well as to subsequent insurances; and that a previous policy did not therefore avoid this one; but if it contained similar printed clauses, was itself made void by the obtaining of this one, without any vote or adjudication by the previous insurers that the property was over insured and an election by them to cancel their policy; although they by their policy reserved the right to cancel it in case of any subsequent insurance which, with theirs, should in their opinion amount to an over insurance.

A notice by the assured to the agent of an insurance company, of the assured's intention to procure subsequent insurance upon the same property, is not evidence of a compliance with a provision in the first policy requiring any subsequent insurance to be made known to the first insurers and indorsed upon the policy, or otherwise acknowledged in writing by them.

The question whether reasonable diligence has been used in communicating a subsequent insurance to the first insurers, when all the facts are agreed, is a question of law for the court.

Seven months is an unreasonable delay in giving notice of a subsequent insurance to previous insurers whose policy expressly required the assured to give such notice "with reasonable diligence."

A policy of insurance against fire, issued by a stock company, in consideration of an entire premium, for one sum upon a stock of goods, and for an additional sum upon the fixtures in the same shop, and stipulating that in case of any subsequent insurance "on the same property," without a certain notice and acknowledgment, "this policy shall cease, and be of no further effect," is wholly avoided by such a subsequent insurance on the goods only.

¹ 8 Gray, 33.

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ACTION of contract upon a stock policy, whereby the defendants, in consideration of one premium, insured the plaintiffs \$5,700 on their stock of goods, and \$300 on fixtures in the same shop, and on the face of which were printed the three clauses following: "Provided further, that in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, not notified to this company and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured or their assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And if any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Howard Fire Insurance Company, amount to an over insurance, said company reserve to themselves the right of cancelling this policy by paying to the insured the unexpired premium *pro rata*."

Answer, a policy for \$4,000 subsequently obtained by the plaintiffs upon the same stock of goods, and not notified to the defendants, or indorsed upon the policy in suit, or acknowledged by them in writing. Upon the face of the second policy was written, "Other insurances permitted without notice until required;" and there were printed clauses precisely like the two first of the three above quoted from the policy in suit.

Trial below before *Bigelow, J.*, who made a report thereof to the full court, so much of which as is material to the understanding of the points of law decided is stated in the opinion.

BIGELOW, J. 1. At the time of the loss by fire, the plaintiffs had two policies of insurance on their stock of goods; one issued by the defendants, bearing date April 2, 1851, and the other by the Hudson River Fire Insurance Company, dated April 19, 1851. The former contains the following stipulation: "If the assured or their assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further

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effect." There was no notice given to the defendants of the existence of the second policy until the 19th of November, 1851, after the stock of goods had been destroyed by fire.

Upon these facts it is quite clear that the decision of the case depends upon the validity of the second policy. If it was valid, then, by the express terms of the contract with the defendants, their liability as insurers ceased; if, on the other hand, it was for any reason invalid, so that it was not a binding contract on the company by whom it was issued, then there was no subsequent insurance on the property, and the plaintiffs are entitled to recover. To this extent the authorities are clear and decisive. *Jackson v. Massachusetts Mutual Fire Ins. Co.* 23 Pick. 418;¹ *Clark v. New England Mutual Fire Ins. Co.* 6 Cush. 342;² *Barrett v. Union Mutual Fire Ins. Co.* 7 Cush. 175;³ *Forbes v. Agawam Mutual Fire Ins. Co.* 9 Cush. 470.⁴

The plaintiffs contend that the second policy never became an operative contract, because it contained a proviso that it should be void and of no effect, if the assured "shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy," and because it does not appear that any such notice was given to the Hudson River Company of the existence of the prior policy, which the plaintiffs seek to enforce in this action. This would be a sound argument, if there was nothing in the second policy to vary or control the effect of this proviso. But there is a written clause, which we think was intended to annul the usual printed formula as to prior and subsequent insurance, and which, rightly construed, must be held to have that effect. It is in these words: "Other insurances permitted without notice until required."

The plaintiffs, however, seek to limit the operation of this stipulation so that it shall apply only to policies of insurance subsequently made upon the property insured. But there are decisive objections to this construction. The words are general, and must be held to have a general application. It is "other," not "further" or "future" insurance which is permitted without notice. In other parts of the policy, when a distinction is intended to be made between prior and subsequent insurance, it is carefully marked by apt words, which clearly indicate to which of the two

¹ *Ante*, vol. 1, p. 764.

³ *Ib.* p. 199.

² *Ante*, vol. 3, p. 131.

⁴ *Ib.* p. 415.

Subsequent Insurance.

reference is made. Besides, by the printed clause it was required of the assured that he should give notice to the company of both prior and subsequent insurance. When by a written clause, to which, as expressing the recent and more immediate intent of the parties, we are to give greater effect than any stipulation in the usual printed form, it is provided that notice of other insurance need not be given, it must be inferred that it was the purpose to dispense with that provision of the contract which otherwise required the assured to give notice of all insurance on the property, whether prior or subsequent to the date of the policy. The second insurance obtained by the plaintiffs was not therefore rendered invalid by failure to notify the company of the previous policy on the property. It was a valid subsisting insurance, and the failure of the plaintiffs to give notice thereof to the defendants avoided the policy declared on in this action.

2. It was urged by the plaintiffs that, if the second policy was valid, their contract was not thereby rendered void, because there was no vote or adjudication by the defendants that the property covered by the insurance was over insured, and no election by them to cancel the policy issued to the plaintiffs. This argument is founded on that clause in the policy which provides that "if any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Howard Fire Insurance Company, amount to an over insurance, said company reserve to themselves the right of cancelling this policy, by paying to the insured the unexpired premium *pro rata*."

But this provision had no reference to insurance on the property, procured without notice to the defendants and without their assent. It was inserted *alio intuitu*. The manifest purpose was to give to the defendants the right to annul the policy at any time when the insurance on the property of which they had notice, and to which they had assented, together with the amount insured by themselves, was so great, as in their opinion to constitute an over insurance on the property covered by the policy. This was an important right to the defendants, especially when insurance was made on a stock of goods which might at any time become greatly reduced in value, and thereby the temptation to cause a fraudulent loss be very much increased.

3. The evidence offered of the notice given to the agent of the defendants, of an intention by the plaintiffs to procure other in-

Lost Policy. — Agency. — Insurable Interest. — Title. — Subrogation.

insurance, was wholly immaterial. If it could have full effect as a notice to the defendants, it would not prove a compliance with the stipulations in the policy which required actual notice of the subsequent insurance, after it was obtained, and an indorsement of it on the policy, or a written acknowledgment thereof from the defendants. *Worcester Bank v. Hartford Fire Ins. Co.* 11 Cush. 265;¹ *Hale v. Mechanic Mutual Fire Ins. Co.* 6 Gray, 173;² *Loring v. Manufacturers' Ins. Co.* ante, 172.

4. Nor can the plaintiffs, by the notice given after the destruction of the property by fire, and seven months subsequently to the date of the second policy, be deemed to have made known the fact of the subsequent insurance to the defendants seasonably. When the facts are not in dispute, it is the province of the court to determine, as a question of law, what is reasonable diligence. *Wheeler v. Field*, 6 Met. 295; *Prescott Bank v. Caverly*, 7 Gray, 221. Under the circumstances of this case, it was clearly the duty of the plaintiffs to have given to the defendants immediate notice of the existence of the second policy.

5. The omission of the plaintiffs to comply with the stipulations in their policy, requiring them to give notice to the defendants of the subsequent insurance, is fatal to their whole claim under the policy. They cannot therefore recover for the loss on fixtures, although not included in the subsequent insurance. The contract is, that if the assured fail to give the notice required, the policy shall cease and be of no further effect. The entire contract was therefore terminated. *Lee v. Howard Fire Ins. Co.* 3 Gray, 594.³
Judgment for the defendants.

THE SUSSEX COUNTY MUTUAL INSURANCE CO. vs. WOODRUFF.⁴
 (Court of Errors and Appeals, New Jersey, March Term, 1857.)
Lost Policy. — Agency. — Insurable Interest. — Title. — Subrogation.

W. brought a suit to recover on a lost policy of insurance: on the trial he was sworn to prove the loss of the policy; he testified that the policy had never come to his hands; that he had never received it; that he had searched for it among his papers, and that he had no such paper in his custody or under his control. *Held*, that the proof was sufficient to establish the loss of the policy.

The representations, declarations, and admissions of an agent, so far as they refer to acts which he is authorized to perform, are binding upon and conclusive against his principal.

Where a mortgage is held as collateral security for the payment of a debt, the holder of

¹ *Ante*, vol. 3, p. 589.

² *Ante*, p. 59.

³ *Ante*, vol. 3, p. 733.

⁴ 2 Dutcher, 541.

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each mortgage has an insurable interest in the property covered by the mortgage to the amount of his claim upon the property.

If a party insures property as owner, in which he has only a qualified interest, the insurance will be valid, unless at the time of effecting the insurance the insured used some artifice, or made fraudulent representations that misled the insurer, and prevented inquiry as to ownership. The mere fact of the insured not disclosing his ownership at the time of effecting the insurance will not avoid the policy.

In an action of covenant against an insurance company to recover an insurance, the defendants cannot show on the trial that at the time the insurance was effected the insured misrepresented his interest in the property, unless it is expressly pleaded that such misrepresentations were made.

Where a party, holding a lien upon real estate to secure a debt, effects an insurance upon such property, in case of a loss the insurance company, on paying the insurance, will be entitled to the benefit of the security held to the amount they have paid; and if they pay the insured the whole amount of his claim for which he holds such security, they will have a right to the whole of the security held by him.

If the insured holds other securities for the same debt, on paying to him his whole claim, the insurers will be entitled to all the securities.

If, after effecting such insurance, the insured parts with any of his securities, or a part of his claim is paid, the insurer will only be liable on his insurance to the amount remaining unpaid.

But if the insured parts with a portion of his securities, or receives a part of his claim after the suit is commenced, it does not affect the case; the equitable claims between the parties cannot be left to the jury on the trial, their rights must be determined as they stood when the suit was commenced, and if the insurer has any remedy, he must resort to a court of equity.

See note to *King v. State Ins. Co. ante*, vol. 3, p. 196.

TEUNIS DEY *et al.* vs. THE POUGHKEEPSIE MUTUAL INSURANCE CO.¹

(Supreme Court, New York, March, 1857.)

Assignment for Benefit of Creditors.

A fire policy containing a provision against assigning the same before or after loss, without assent, is avoided by an assignment after loss by one of several insured parties for the benefit of creditors. Such a prohibition is valid.

THE case is stated in the opinion.

By the Court, WELLES, J. After the evidence was closed at the trial, the defendants' counsel moved for a nonsuit upon five distinct grounds, the fifth of which was, that the assignment of the policy was not with the consent of the company: the policy, by its terms, being void if assigned without the consent of the company in writing; and such consent in writing being required, whether the assignment was made before or after a loss. The justice presiding held that each of the defendants' grounds for a nonsuit, excepting the fifth, embraced a question of fact for the jury; and as to the fifth ground, he deemed it most discreet to

¹ 23 Barb. 623.

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allow the jury to pass upon the questions of fact, and let the cause be examined at the general term, and refused to grant the motion for a nonsuit; to which the defendants excepted; after the justice had charged the jury, five questions were propounded, to be passed upon by them, to each of which, excepting the fourth, the jury responded favorably to the plaintiffs. The fourth was as follows: "Was the policy in this case, or any claim thereunder, assigned by Gerard Dey to Teunis and Richard V. Dey, with the consent of the defendants, manifested in writing?" To which the jury responded, "No."

The defendants' counsel now contends that the policy in question has become inoperative and void, and that all claim under it has been forfeited by the assignment of the interest of one of the assured to the plaintiffs. If he is right in this position, it will supersede the necessity of considering any of the numerous other questions raised upon the trial and discussed upon the argument.

The policy provides, that in case of any assignment, transfer, or termination of the interest of the assured, or of any claim under the policy, either by sale or otherwise, whether prior or subsequent to any loss or damage, without the written consent of the company, the policy shall thenceforth be void and of no effect; and that any liability of the company upon such claim shall thenceforth cease. The assignment made by Gerard Dey, one of the assured, to Richard V. Dey, the other assured, and Teunis Dey, if it passed any interest of the assignor in the policy or in his claim upon the company in consequence of the loss, was within the interdiction of the policy. If it did not, there is nothing to show why Teunis Dey is a party plaintiff, or why Gerard Dey is not such party. It is not necessary to consider the question, whether such interest of Gerard Dey did pass by the general assignment of the latter, because if it did not, it is clear that the action, by the present parties plaintiffs, cannot be sustained. For the purposes of the present question, I shall assume that the assignment did convey the interest of Gerard Dey in the policy and the claim upon the company in consequence of the loss of the goods insured, or rather, that it was so intended, and would have conveyed such interest except for the inhibitions of the policy. If the question was upon the clause of the policy against an assignment, first stated, which avoids the policy in case of assignment without the written assent of the company,

there would be no difficulty in the plaintiffs' way in this respect ; such provisions having been repeatedly held to apply only to assignments made before a loss and during the continuance of the risk. But the parties to this policy have expressly stipulated, by another and distinct provision, that such assignment, *whether before or after the loss*, shall render void the policy. There is no room, therefore, to doubt what the parties intended, which is always the thing to be sought after in the interpretation of a contract. That intention, when not contrary to law, must always govern. The question, then, is, was it competent for the parties to make a valid agreement that an assignment of any interest of the assured, after a loss, should avoid the policy ? In my opinion such an agreement is valid and lawful. I am unable to perceive that it would violate any rule of public policy, any more than the prohibition of an assignment before a loss which is confessedly lawful and binding. There are doubtless some reasons in support of the latter, which would not apply to the former ; but both must rest, for their validity, upon the same general considerations, which grow out of the views which the parties entertain in respect to what their interest or safety requires. Neither of the provisions referred to would probably be affected by an assignment *in invitum*, or by operation of law ; but would be intended to mean voluntary assignments in both cases.

It is contended on the part of the plaintiffs, that the assignment was not within the prohibition, because it was in trust for the benefit of creditors. This does not appear by the case ; but assuming the assignment was of that character, it is not perceived how it would alter the case. The provision is against any assignment of any claim of the assured, &c. The object of the company undoubtedly was to protect themselves against controversies with strangers, or persons other than those with whom they contracted. This they had a right, as I think, to do, and the court cannot make distinctions between different degrees of violations of the provisions of the policy, or measure their extent. If this assignment had simply been from one of the assured to the other, they being partners, it would not, for the reasons stated by Roosevelt, Justice, in *Wilson v. The Genesee Mutual Insurance Co.* 16 Barb. 511, have affected the policy. But as it is, the company are called upon to litigate with a party with whom they had not contracted, and which their policy pro-

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tected them against. I think there should be a new trial, with costs to await the event.

The other members of court concurring in the foregoing views, it was so ordered.

NOTE. See upon the same point, but to the contrary effect : —

COURTNEY vs. NEW YORK CITY INSURANCE CO.¹

(Supreme Court, New York, September, 1858.)

By the Court, BROWN, J. The contract of insurance was between the New York City Insurance Company and Michael McNamara. The loss by fire occurred on the 1st of September, 1854, and on the 8th of the same month the defendants were served with notice and with the preliminary proofs required by the eighth condition annexed to the policy. On the 31st of May, 1855, after the service of the preliminary proofs of the loss, and after McNamara's right to the amount of the loss had accrued and become perfect, he assigned the claim or demand to the plaintiff by deed duly executed, of that date. Amongst the conditions annexed to the policy, and which are made a part of the contract, is one in the following words, numbered 4 : " Policies of assurance subscribed by this company shall not be assignable before or after a loss, without the consent of the company expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of such company in virtue of such policy shall thenceforth cease," &c.

Whenever the loss occurs and the company have notice and are furnished with the preliminary proofs required by the conditions, the amount of the policy becomes, by force of the contract, a debt payable to the insured presently or at the time appointed in the policy. If the purpose of the fourth condition, or one of its purposes, is to prevent a sale and assignment of the debt after it had accrued and the right to it become perfect, I very much doubt whether such a condition is valid or can be enforced, for the reason that it is

repugnant to the principal object of the contract. Whenever the right of property in the debt or damage attaches and becomes perfect, all the incidents of property attach also, including the power of sale and disposition. Now this power of sale and disposition is inseparable from the absolute right of property, and any condition of the kind attached to the sale of real or personal estate, when there is no reverter or reversionary estate in the vendor, is repugnant, and absolutely void. 1 Bac. Abr. 646 ; 4 Kent's Com. 131 ; *Bradley v. Peixoto*, 3 Ves. 324.

The effect of such a condition is quite obvious, whatever may have been the motive which made it a part of the policy. It is not to define, ascertain, and preserve the rights of the parties, to avoid or terminate controversies and promote the ends of justice. It evidently contemplates nothing short of resistance and litigation, and thus essays, in advance, to choose its adversary. It is a positive impediment in the way of the assured, for it forbids him to sell, assign, or hypothecate his claim, or to realize a dollar towards the reparation of his loss and the renovation of his property, except at the pleasure of the company, or the worse alternative of a protracted and costly controversy. It puts it in the power of the insurer to prescribe terms of adjustment in disregard of the rights of its weaker adversary. The business of insurance is a most commendable and useful pursuit, fruitful of the happiest and most beneficial results when conducted with integrity and good faith, and when losses honestly and innocently sustained are promptly liquidated by a ready execution of its obligations. But

¹ 28 Barb. 116.

What Policy covers.

when they are repudiated or evaded, when just claims are answered by doubts and delays, and technical objections,—founded perhaps on some informality in the preliminary proofs, or, as in this case, upon some of the numerous conditions annexed to the contract,—and finally by a flat refusal to pay, and a litigation unscrupulous and protracted, then it becomes a substantial oppression, and a calamity more grievous than the conflagration in all its fury. I do not think it necessary to determine this question, however. If it were, I should most readily adopt the reasoning and conclusion of Mr. Justice Allen in *Goit v. The National Protection Insurance Company*, 25 Barb. 189,¹ published since the argument. The right of the plaintiff to sustain this action may, I think, be safely placed upon another ground.

Conditions of this kind are to be construed strictly; for they are manifestly in restraint of the free use and enjoyment of the rights of the assured under the contract, and are among the number of those almost innumerable conditions, usually inserted in contracts of this kind for the benefit of the insurers, and which not unfrequently escape the notice of the assured at the time of making the contract. It is the policy of insurance that is not assignable either before or after a loss, without the consent of the insurer. And in case of such assignment, without consent, the liability of the company in virtue of such policy shall thenceforth cease. Not that its obligations to pay a debt which has already accrued shall be discharged and extinguished, but that the contract of insurance and of future liability shall cease. The language of the condition can have full effect, and receive

a sensible construction without destroying or impairing the right to recover a debt already accrued. And that is to regard the language as referring to the future liability of the company and its obligation to make good losses to accrue thereafter. The liability of the company to the holder of the policy is of two kinds, entirely different, and capable of separation; continued liability as insurers, and liability to pay damages which have accrued, and the right to which have become perfect. In the event of a partial loss, the policy does not cease. The obligation to pay such loss as has occurred exists at the same time with an obligation to make good any loss to be sustained thereafter, qualified of course by the amount of the insurance effected. In the event of a partial loss, the damages which have accrued may be assigned to a third person, while the policy may still be held by the insured as security for future losses. The two kinds of liability are clearly distinguishable and severable. Upon looking at the deed of assignment it will be seen that the subject of it is not the policy of insurance, but the debt, demand, and right of action which had accrued to the assignor in consequence of the loss by fire. The policy, and the contract to insure in future, did not pass by the assignment, but remained in its original condition.

I am therefore of opinion that the words, "the liability of the company in virtue of such policy shall thenceforth cease," must be construed to mean its liability as an insurer for losses to accrue thereafter, and not for losses which have already accrued; and consequently the judgment should be affirmed.

JOEL vs. HARVEY.²

(Queen's Bench, England, April, 1857.)

What Policy covers.

Under a policy on a corndealer's and seedsman's "stock in trade, consisting of corn, seed, hay, straw, fixtures, and utensils in business," the value of hops and matting cannot be

¹ *Ante*, p. 8.² 5 Weekly Rep. 488.

What Policy covers.

recovered, although these articles form an ordinary part of the stock in trade of such a business.

THIS was an action on a policy of insurance against fire on the plaintiff's "stock in trade, consisting of corn, seed, hay, straw, fixtures, and utensils in business." The plaintiff, who was a corn-dealer and seedsman at Bristol, and was so described in the policy, claimed under the above words to recover, among other things, the value of a quantity of hops, as well as of some matting belonging to him, which had been destroyed. The defendants having paid into court a sum of £520, sufficient to cover the other items of claim, repudiated liability for the hops and matting, as not included in the words of the policy, and the question as to these was the only question at the trial, which took place before Crowder, J., at the last Gloucester assizes. The plaintiff having adduced evidence that hops and matting were usually sold by and formed part of the ordinary stock in trade of corndealers and seedsmen in Bristol, the jury, in answer to questions put by the learned judge, found: 1st, that the hops and matting formed part of the plaintiff's stock in trade at the time when the policy was effected; 2d, that the defendants were not aware of this; and 3d, that hops and matting formed part of the ordinary stock in trade of a corndealer and seedsman in Bristol. Under these circumstances the verdict was entered for the defendants, leave being reserved to move to have it entered for the plaintiff for £258 if the court should be of opinion that he was entitled to recover for the value of the hops and the matting.

LORD CAMPBELL, C. J. I think that we must not be led away by a conjecture as to the intention of the parties to give a construction to the words used which they do not fairly bear, and we must suppose that both parties knew the meaning of the words which they used. If the words had been "the stock in trade" only, the plaintiff would have been entitled to recover; but the words "consisting of" exclude everything not enumerated, and therefore if hops do not come under the words "corn, seed, hay, straw, fixtures, and utensils in business," they are excluded. It cannot be said that they come under any of these words, and therefore the verdict was right.

WIGHTMAN, J. I am of the same opinion. The words "consisting of" are words of limitation, and the value of the hops, which are not included under the words used, cannot therefore be

Proofs of Loss. — Waiver. — Assignment. — Force Pump. — What Policy covers, etc.

recovered under the policy. If there had been nothing on the premises but hops, then the case quoted might have applied. But there were other articles there, to which the words referred.

ERLE, J. We ought to give an effect to the words used, according to their general acceptance, and the words of limitation clearly exclude hops.

CROMPTON, J. I should be anxious to give a wide interpretation to the words of the policy, but we cannot reject the words "consisting of." I cannot agree that if there had been nothing on the premises but hops, the policy would have included them. The case cited would not apply, because other things might be brought in from time to time. However, as the case stands, I agree that the verdict was right. *Rule refused.*

PEORIA MARINE AND FIRE INSURANCE COMPANY vs. DAVID LEWIS *et al.*¹ (Supreme Court, Illinois, April Term, 1857.)
Proofs of Loss. — Waiver. — Assignment. — Force Pump. — What Policy covers. — Amount of Recovery.

An insurance company may waive imperfections and deficiencies in the statement of loss and proof required by the policy; and all objections to the sufficiency of proof will be considered as waived to everything not specifically pointed out.

Upon notice, and an account and proofs furnished of loss, to an insurance company, all objections that might be but are not taken, if the company objects to paying, will be considered as waived; and only such objections can be insisted on as were first made.

If it is objected that an assignment or change of interest in the premises insured was executed subsequent to the policy, want of consent must be averred, in a plea to an action on the policy, or it will be presumed that the conditions of the policy were complied with.

Where the conditions of a policy require that notice of a loss shall be given "forthwith," it will be understood to require the use of due diligence, and that it shall be given within a reasonable time under the circumstances.

If it is represented that a force pump is connected with the building insured, and there is such a pump, but without hose, there will be a compliance with the condition.

The insurance of a starch manufactory will include fixtures and machinery.

If a greater loss is proved than the whole amount insured by different policies, the party insured will be entitled to recover the full amount of each policy, unless the recovery shall be limited, by the policy, to only a proportion of the loss.

The insured will be entitled to interest upon the amount of loss proved within the policy from the time fixed for the payment, after proof of loss.

¹ 18 Ill. 553.

Reinsurance.

CARRINGTON & DOUGHERTY vs. COMMERCIAL FIRE AND MARINE INSURANCE CO.¹

(Superior Court, New York, April, 1857.)

Reinsurance.

By the terms of the contract in controversy the defendants "reinsured the American Ins. Co. of A., upon the following policies issued by them" (a detailed statement of which policies is embodied in the contract), "loss, if any, payable to the assured upon the same terms and conditions as contained in the original policies." *Held*, that the word "assured" meant the party reinsured, and not the party originally effecting insurance.

BY the Court, BOSWORTH, J. By the terms of the contract of November 30, 1854, the defendants "reinsure the American Mutual Insurance Company, of Amsterdam, upon the following policies issued by them" (a detailed statement of which policies is embodied in and forms part of the contract), "loss, if any, payable to the assured upon the same terms and conditions, and at same time, as contained in the original policies. Reinsured from November 30, 1854, twelve o'clock at noon, to the expiration of the policy."

If the word "assured," as used in this contract, means the party reinsured, the present plaintiffs have no interest in the contract, and no right to maintain an action upon it. Assuming the word "assured," as there used, to have that meaning, and the contract to be valid, the plaintiffs must look to the American Mutual Insurance Company alone, and to its assets, which have and may come to the hands of its receiver, for indemnity.

They have no lien upon the contract in question, nor right to the moneys which the defendants may pay under it. Such moneys, when paid, will form part of the assets of the company which insured them, and the plaintiffs must be paid *pro rata* with its other creditors. These propositions are so well settled, that it is unnecessary to do more than refer to the cases which have determined them: *Hone et al., Receivers, &c. v. The Mut. Safety Ins. Co.* 1 Sand. 187; affirmed by the court of appeals, 2 Coms. 235; ² 1 Arnould on Ins. 288, § 119; Parsons on Mercantile Law, 514, § iv.

The contract of the 30th of November, according to the view taken of it by the complaint, is one by which the defendants "agreed, in substance, to assume, and did thereby assume, the

¹ 1 Bosw. 152.² *Ante*, vol. 2, p. 579.

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liabilities, contracts, and agreements of the said American Mutual Insurance Company in the said policy created and contained; and promised and agreed to pay the loss, if any, under the said policy, to the plaintiffs," &c.

The complaint, however, also avers, that on or about the 30th of July, 1855, the said American Insurance Company released and assigned to the said plaintiffs all the claim and demand of the said American Insurance Company against the said defendants, by reason of the premises, of which the said defendants had notice. These allegations are put in issue by the answer.

There is no evidence in support of the fact of such an assignment, and there could not well be any, as such corporation had been dissolved long prior to the 30th of July, 1855. If the word "assured" does not mean the party "reinsured," and that party only, then it includes and embraces not only the plaintiffs, but also nineteen other individuals and firms. By the contract of reinsurance, the defendants took upon themselves the risks which the corporation, reinsured, had incurred, by issuing twenty separate and distinct policies. The chief justice must have supposed that the word "assured," as used in the contract in question, was a word of clear import and obvious application, and, for that reason, excluded evidence offered to show, that by it the defendants and the agent of the other contracting party understood and intended it to apply to the persons named as the assured in the original policies. The contract is one of reinsurance.

The risks incurred by the American Mutual Insurance Company, by the particular policies which it had previously issued, were the subjects of the contract. By the very terms of the contract, the latter company were reinsured "upon the following policies issued by them," and were properly and truly named in it, as the "assured." They were as truly, in fact and in law, the "assured," within the meaning of that word, as used in that contract, as were the plaintiffs, in the policy issued to them by the American Mutual Insurance Company. To treat it as made for the benefit of the original assured, and providing that the loss, if any, should be paid to them, so as to give them a right to recover the amount of the loss, and retain the money for their own indemnity, is in effect making it a double insurance, rather than a contract of reinsurance. If a contract of reinsurance, the fruits of the contract belong solely to the party reinsured, and

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must be distributed by the receiver, as part of its general assets, and in the same manner as the other assets of the insolvent corporation.

If it is a contract, by virtue of which the original assured may recover in their own names, and retain for their exclusive indemnity, the moneys which the defendants are liable to pay, then it possesses none of the elements of a contract of reinsurance. To give it such a construction, is not only varying its clear legal import, but, in our opinion, its express terms.

Any parol evidence offered to produce that result should be excluded. 1 Sand. S. C. R. 151, 152. In the case of *Hone et al., Receivers, v. The Mut. Safety Ins. Co.* 1 Sand. 188-9, the contract of reinsurance "was the usual printed form of a fire policy, with no change, except the insertion in writing of the prefix *re* before the word *insure* in the commencement of the instrument." By it, citing its words, "the said company do thereby promise and agree to make good unto the said insured, their executors, administrators, and assigns," &c. That contract, being by its terms one of reinsurance, the court refused to receive parol evidence, varying its legal import as such.

We think it quite clear, that even assuming the contract to be valid, it is one in which the plaintiffs have no interest, and therefore one, upon which no action can be maintained in their names as plaintiffs. This presents a case of an entire failure to prove, in substance or legal effect, the averments contained in the complaint as the basis of a cause of action in favor of the present plaintiffs. Code, § 171; *Mason v. Morewood*, 5 Sand. 557. These views, if sound, render it unnecessary to determine the question whether the contract is obligatory upon the defendants.

The contract, by its terms and in legal effect, is one between two corporations. One of them, the party reinsured, was disabled from contracting by an order of the supreme court made prior to the date of the contract. That order enjoined and restrained that corporation, and each and every of its officers, "from exercising any of its corporate franchises," and sequestrated its effects, and continued it "in existence so far only as" might ("may") be necessary to enable the receiver to be appointed," &c., "and for no other purpose whatever," and declared that for all other purposes, "when the above specified objects shall be attained, the said corporation be, and is hereby, dissolved."

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Whether the receiver, at his election, with or without an order of the court, is competent to adopt and ratify the contract, and enforce it against the defendants, is a question which does not now arise.

We think it quite evident, that neither the corporation nor any of its officers, subsequent to the order of the 27th of November, could make any contract which would bind the corporation as such, or on which any claim could be established, creating a right to have it satisfied out of its assets.

The contract was made by its agent and the defendants, upon a mutual mistake as to the continuing capacity of the reinsured corporation to make a contract. Whether the defendants, after having received the whole consideration of the contract, and continuing to retain it, can be made liable to any party by reason of, and upon the contract, we are not disposed to discuss, having come to the conclusion that the plaintiffs have given no evidence in support of the allegations, that, by the terms of the contract, the loss, if any, was to be paid to them, and that all the interest of the American Mutual Insurance Company in it, as a competent and actual contracting party, had been assigned to the plaintiffs. The verdict must be set aside, and a judgment entered dismissing the complaint, under the stipulation giving that power to the court, and contained in the printed case.

G. CURRIE DUNCAN, President, etc., for the benefit of George Wingfield & Co. *vs.* SUN MUTUAL INSURANCE CO.¹

(Supreme Court, Louisiana, June, 1857.)

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If upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is, that the party named as the assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person.

THE case is stated in the opinion.

SPOFFORD, J. This suit is upon a fire policy to recover a loss upon certain packages of wine.

It is brought by George Currie Duncan, in his quality of

¹ 12 Louisiana Annual, 486.

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president of the New Orleans & Carrollton Railroad Company, and the Jefferson & Lake Pontchartrain Railroad Company, for the use and benefit of George Wingfield & Co., against the Sun Mutual Insurance Company.

It is alleged that the wine belonged to Wingfield & Co., by whom it was deposited in the railroad company's depot at Tivoli Circle, in New Orleans, thence transported for hire in the plaintiff's cars to their depot or wharves on the lake shore, and there burnt and lost.

The defendants contend that they insured nobody against loss but the railroad company; that there is no privity of contract between Wingfield & Co., for which reason that firm has no right of action; and that the railroad company has no right of action, because it has lost nothing.

By the terms of the policy the defendants covenanted "to insure George Currie Duncan, president, &c., against loss or damage by fire or merchandise, being such as may be placed in the depots hereinafter named, for conveyance to and from the city to Lake Pontchartrain, to wit: on merchandise contained in the depot at Tivoli Circle, to the amount of \$3,000; on merchandise contained in the depot at the lake end of the Jefferson & Lake Pontchartrain Railroad to the amount of \$5,000. The risk in the cars is also to be covered by this insurance to the extent of the amount of this policy, to wit: \$8,000, for one year; and the said company do hereby promise and agree to make good unto the said assured, their executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum hereby insured, as shall happen by fire to the property, as above specified, during one year, &c., the said loss or damage to be estimated according to the true and actual value of the said property at the time it shall happen," &c., &c.

The usual condition is annexed to the policy, that "goods held in trust or on commission are to be declared or insured as such, otherwise this policy will not cover such property."

No such words as "for whom it may concern," or "in trust for," are employed in the policy. It is true there is nothing sacramental or indispensable in these ordinary phrases. If upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person

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in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is, that the party named as assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person. Thus it is held that a commission merchant who is insured against loss by fire upon "goods, as well the property of the insured as held by him on commission," in a certain store, may recover in his own name the value not only of his own goods destroyed by fire, but of those of his constituents in the same store. *De Forest v. Fulton Fire Ins. Co.* 1 Hall, 100.¹

But the general rule is thus stated by Mr. Phillips: "Insurance made by a person in his own name only, without any indication in the policy that any other is interested, can be applied only to his own proper interest in the subject, or his interest as trustee." 1 Phillips Ins. § 380.

In the present case the defendants only insured the railroad company against loss or damage by fire upon merchandise in certain of its depots or on the transit between them. It is true the policy does not imply that the merchandise must necessarily belong to the company. But no matter to whom it might belong, there is nothing in the policy or in the evidence to indicate that the defendants intended to do anything more than indemnify the railroad company against the loss or damage the company might sustain from the destruction or deterioration of such merchandise by fire. There is nothing in the circumstance of a railroad company taking out such a policy to lead the underwriters to suppose that the company sought anything more than its own protection. There is no allegation or proof of a usage of railroad companies to insure for the benefit of their customers, nor of a contract with Wingfield & Co., or instructions from them to insure, nor of a payment of this loss by the plaintiff to Wingfield & Co., nor even of a liability to pay it, or an undertaking on its part to warrant against all losses by fire.

On the other hand, that the company might have an insurable interest in goods intrusted to it by bailors for transportation is clear. The doctrine upon this subject is well stated by Mr. Angell in his *Treatise on Fire and Life Insurance*, § 77: "An in-

¹ *Ante*, vol. 1, p. 223.

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land carrier will, in general, have an insurable interest and a right to provide an indemnity against such accidents to the property placed in his hands, as will render him liable under his contract. Thus, it was held that common carriers along the line of a canal had an insurable interest to the full value of all the goods placed in their hands which they might protect under the general words of insurance ordinarily employed." But in the following section of the same treatise it is shown that the practice is to allege that the goods intrusted to him as a common carrier were consumed by fire, and that the assured thereby became liable to pay to the respective owners a sum equal to that named in the policy.

It was remarked by Mr. C. J. Jones, in the case of *De Forest v. Fulton Fire Insurance Co.*, already cited from Hall's Reports, that "a carrier may insure the goods he contracts to carry; yet he has neither the legal title nor the beneficial interest in them; but he is responsible for their loss. His insurance is upon the goods; yet his indemnity is against the consequences of his implied guaranty for their safe carriage, and not against the loss or deterioration of the property by the perils insured against."

As the interest of Wingfield & Co. in the wine was not covered by the policy in this case, even by implication, it follows that the railroad company is the real plaintiff. This was also asserted by counsel representing that side, on the oral argument, and as the company did not own the wine, it should show some loss or liability of its own on account of fire to authorize a recovery; for the insurance only promised to indemnify the company for its own loss or damage by fire.

The testimony is that a burning steamboat came suddenly against the wharf where the goods were deposited, and set them on fire, and that it was impossible to save them. So far as the evidence goes in this case, this would seem to have been an accidental calamity beyond the control of the company or its servants. And the Article 2725 of our Civil Code declares that "carriers and watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events."

As there is neither allegation nor proof that the railroad company, which alone was insured, has sustained any loss or incurred

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any liability to Wingfield & Co., or any other person, by reason of the destruction of the wine which belonged to Wingfield & Co., there must be judgment of nonsuit.

It is therefore ordered and decreed, that the judgment of the district court be avoided and reversed, and that there be judgment against the plaintiff as in case of nonsuit, he paying costs in both courts.

GEO. W. HALLOCK vs. THE COMMERCIAL INSURANCE COMPANY.¹

(Supreme Court, New Jersey, June Term, 1857.)

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The acceptance of a proposal to insure for the premium offered is the completion of the negotiation ; and after the policy has been forwarded to the agent of the company for delivery, the contract cannot be rescinded without the consent of the insured.

If the premium is tendered to the agent when application for insurance is made, and he does not receive it, but says he will consider it as paid, and authorizes the applicant to keep the money until the policy arrives, the contract will be as binding upon the company as if the money was actually paid to the agent.

If an insurance company take a risk to commence previous to the date of the policy, and the property is destroyed before the policy is actually executed and delivered, and there is no fraud or concealment by the party insured, the company will be as much bound as if the loss occurred after the policy was delivered.

A contract arises when an overt act is done intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not ; and unless a proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given in a reasonable time.

THE case sufficiently appears in the opinion.

VEEDENDURGH, J. G. W. Breck was the agent of the defendants at Bath, New York, to make surveys, receive proposals for insurance, and receive premiums on risks accepted by the company, but was not authorized to make insurances or issue policies. The proposals for insurance were sent by him to the company at Jersey City, and if accepted by them, the policies were to be sent to him to deliver.

On the 2d of March, 1855, the plaintiff applied to him to insure his building in Bath, for one year from the 10th of March, for \$1,200. Breck made the survey, and told him what the premium would be. The plaintiff thereupon offered the premium to Breck, who said he would consider it as paid, but would leave it with the plaintiff, who was a banker and with whom he kept his account, until the policy arrived, when he would call and get the money. The application was signed by the plaintiff, and

¹ 2 Dutcher, 268.

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with the survey attached, was sent by Breck to the company, on the 2d or 3d of March. The defendants deferred acting on the application until the secretary could procure a map of Bath, referred to by Breck.

On the 13th of March, between ten and twelve A. M., the map having been received, a policy was filled up on said building, insuring it from the 10th of March for one year, signed by the proper officers, and mailed at Jersey City, directed to Breck at Bath, which by due course of mail would have reached him on the 14th of March, but which, owing to the snow, did not until the 16th of March. At the same time that Breck received the policy he also received a telegraphic dispatch, dated the 15th March, as follows: "Risk not taken when burnt. Return policy when received."

Accompanying the policy was also a letter from the secretary, of the tenor following: "Office of the Commercial Insurance Company, No. 3 Montgomery St., Jersey City. March 13th, 1855. Messrs. Breck and Sawyer, esq's, Bath, N. Y. Dear sirs,— Your application on G. W. Hallock's saloon has been held under advisement till we could procure a copy of the map of which you speak in your letter. We do not look on it as a very desirable risk, but nevertheless, as the rate seems a fair one, we inclose a policy, relying very much on your representation in regard to the good character of the occupant. Inclosed please find policy No. 1054, for \$1,200, premium \$24. Respectfully,

"J. M. Chapman, Sec'y."

On the 16th March, after the policy arrived, the plaintiff tendered the premium in gold to Breck, and demanded the policy. Breck accepted the money, because he had refused to accept it when the application was made, and considered it on deposit, meaning to put the plaintiff in the same situation as if he had received it on the 2d of March, but refused to deliver the policy because so directed by the defendants.

The building insured was entirely consumed by fire on the 13th of March, at eight A. M., about two hours before the risk was accepted or the policy signed. There was a variance between the policy declared on and the original in the time of payment of the insurance and the name of the officers who signed the policy. The suit is on the policy, and the plea the general issue.

As to the variances, there is no proof nor even any allegation that the defendants were misled by them to their prejudice, and

they must consequently under the 43d section of the Act of 1855 (Nix. Dig. 641), be deemed to be immaterial.

The defendants submit two other points, viz. : —

First. That the policy is void, because when made the loss had already occurred ; second, that the policy never did become a contract of insurance.

As to the first point, the policy is not dated, but it was signed on the 13th of March at noon. The fire happened about two hours before. The policy, by its express terms, insures the building from the 10th of March, 1855, at noon, to the 10th day of March, 1856, at noon. There is raised no question of fraud, concealment, or misrepresentation.

So far as appears by the case, when the policy was signed both parties were equally ignorant of the fire ; even if the plaintiff knew, and the defendants were ignorant of it, it was so in both cases by a physical necessity. Or even if the plaintiff had known of it, and could have telegraphed it to the defendants in time to have reached them before they signed the policy (neither of which appears), he was, in the circumstances then existing, under no legal or moral obligation so to do.

There can be no doubt but that the policy, in its terms, is precisely as both parties intended it should be. The application was for insurance from the 10th ; the defendants had held it under advisement from the 2d to the 13th, thereby preventing the plaintiff from applying elsewhere, and then, by express terms, insured from the 10th for one year. They intentionally made the year's risk commence from the 10th. If the fire had occurred on the 13th March, 1856, instead of 1855, under this policy the defendants could not have been held liable. When they filled up the policy, they elected to take the premium from the 10th. They took their pay for the very time during which the fire occurred ; and thus say now, in effect, this is a very good policy from the 10th to the 13th, if no fire occurs, but a void one if there does. The question, therefore, really is, is a contract to insure against fire from a time past void in law ?

No decision, or authority, or principle, sustaining such a doctrine has been referred to before us. It is every day's practice in both marine and fire insurance. A contract is good, unless shown to be against good morals or sound policy. I do not see how this contract contravenes either, or what difference in principle there

can be between insuring from a time past and a time to come. Many cases will be found recognizing the validity of such contracts. *Lightbody v. North American Ins. Co.* 23 Wend. 18;¹ *Perkins v. Washington Ins. Co.* 4 Cow. 645, 665;² *Kohne v. The Ins. Co. of N. America*, 1 Wash. C. C. R. 93; 12 Wheat. 804; 20 Barb. 475.

Secondly. The defendants insist that the policy never did become a contract of insurance; that even if the fire had happened on the 14th of March, or at any time afterwards, no action could have been sustained upon it.

The defendants suggest three reasons why the policy never became a contract: —

First. Because the premium never was paid.

Second. Because the application of the plaintiff cannot be considered as an existing offer when the policy was signed.

Third. Because the policy never was delivered.

Upon the first point it is insisted, in the first place, that on the 2d of March Breck was not the agent of the defendants to receive the premium; that he was such agent only *after*, and not before the risk had been *accepted* by the company; that the acceptance of the risk was a condition precedent to Breck's authority to receive the premium.

One of the conditions of the policy is, that no insurance shall be binding until payment. The premium must consequently be paid either at or before the legal acceptance of the risk. The case, therefore, when it says that Breck was the agent of the company to receive the premium on risks accepted, cannot mean that he was not authorized to receive until after the risk was accepted; because if that were so, no insurance could ever be effected at all. When the case says Breck was the agent to receive premiums on risks accepted by the company, it can only mean that he was the agent to receive premiums, not absolutely, so as to bind the defendants to accept the risk, but conditionally, provided the risk should be accepted. The words, "upon risks accepted," is applied in the same sense to the receipt of premiums as it is to the making of surveys and receiving proposals. Breck had no authority to insure, and the case, by the terms "risks accepted," meant to negative the idea that he could so receive premiums as to bind the company to accept the risk. Breck was authorized to receive the premium in the same way as the defend-

¹ *Ante*, vol. 2, p. 1.

² *Ante*, vol. 1, p. 148.

ants themselves would receive it, with the proposals, before they had decided to take the risk, viz., on deposit and conditionally, so as to make the proposal perfect and so as to leave nothing further to be done by the applicant, and leaving nothing to be done by the defendants to perfect the contract but a simple election. If they elected not to accept the risk, the money was not theirs; it belonged, and must be returned to the applicant; but if they elected to accept, it *eo instanti* was rightfully in their possession and became their property. As the defendants could receive the premium with the proposal, and as a part of the proposal to await their election, so they could and did authorize Breck to receive the proposal and the premium to await the result, and the reception of the premium by Breck was the reception by them.

The defendants next insist, that if Breck was authorized to receive the premium on the 2d, yet that he did not in fact receive it until after countermand.

The case shows that the plaintiff, when he made his application, offered Breck the premium, who said he would consider it as paid, but would leave it with the plaintiff, who was his banker, till the policy arrived, when he would call and get it. Would it have made the payment more real if the plaintiff had handed Breck the money, and Breck had deposited it with his banker? The money was, in legal effect, paid to Breck, and by him placed on deposit. It was, in contemplation of law, an actual payment to the company, as much so as if Breck had transmitted the money, as well as the application, to the company. But if not an actual payment, the defendants are estopped from saying that it is not. They must be considered as doing what Breck did, viz., saying to the plaintiff, on the 2d of March, when he tendered them the money, we will consider it as paid. *N. York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. 474.¹

Secondly. The defendants insist that the application, having been made on the 2d of March, and no action having been taken by the defendants until the 13th, we cannot consider the plaintiff as still continuing his offer to the defendants; that we are bound to consider it as withdrawn. But why so? There is no pretence of any express withdrawal. The question and the answer can never, in any case, be simultaneous; the question must always remain for some length of time with the one to whom it is put, and abide the answer. In every negotiation, whether by

¹ *Ante*, p. 96.

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telegraph, by letter, or by word of mouth, the application and the answer can never be at the same precise instant. The application must wait upon the answer. If the application is considered to be withdrawn as soon as made, no two minds ever could meet upon any proposition. The *aggregatio mentium* never could take place. In all cases, the application is construed to stand until the contrary appears; until it is either withdrawn or answered. Pothier *Traite du Contrat du Vente*, p. 1, § 2, art. 3, No. 32; *Mactier v. Frith*, 6 Wend. 103.

But here the plaintiff avers the application to be still standing. The defendants treat it as still before them on the 13th of March, by accepting it, and making out the policy. We must therefore treat it as the parties treat it, as still at noon on the 13th of March a standing and valid offer by the plaintiff to the defendants.

Thirdly. The defendants contend that the policy never was delivered, so as to make it a living contract. But it appears, by the case, that the contract to insure was complete before they mailed the policy to Breck. Their telegraphic dispatch, dated on the 15th of March, says, "Risk not taken when burnt; return policy when received." This necessarily implies that the risk was taken, but taken after the fire. Breck had no authority to insure. After the proposals were accepted by the company, they made out the policies, and sent them to Breck to deliver; so that it appears, by the case, that before they mailed the policy to Breck, they must have received the premium and accepted the risk, and thus completed the contract to insure. If the case had gone no further, and no policy had ever been made out, it is well settled that the plaintiff could have sued them upon this contract at law or forced from them a policy in equity. *Perkins v. Washington Ins. Co.* 4 Cow. 660; ¹ *Hamilton v. Lycoming Ins. Co.* 5 Barr, 339; ² *Angell on Fire Ins.* §§ 34, 47; *Union Mutual v. Commercial Mutual*, Law Reporter, March, 1856, p. 610.

Under these circumstances, a policy drawn up and signed by the proper officers wants no further delivery. It is a vital policy as soon as signed, becomes instantly the property of the insured, and is held by the insurer for his use. *Ang. on Fire Ins.* §§ 31, 33; *Pim v. Reid*, 6 Man. & Grang. 1; ³ *Kohne v. Ins. Co.* 1 Wash. C. C. R. 93.

¹ *Ante*, vol. 1, p. 148.² *Ante*, vol. 2, p. 542.³ *Ib.* p. 245.

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But here were further acts of delivery of the policy. It was, on the 13th of March, mailed and sent to Breck, to deliver to the plaintiff. This was sending it to the plaintiff by Breck. Breck and the mail were only the vehicles to carry it to him. It was the same thing as if mailed or sent directly to the plaintiff. The defendants suggest, in answer, that Breck was their agent, and that, by sending it to him, they did not part with the possession of the policy, and that they only gave authority to Breck to deliver, which they could and did revoke before actual delivery. But when they mailed the policy to Breck to deliver, they did not constitute him their agent to receive or keep it for them, nor to retain it as their agent. He was, in that regard, no agent of theirs; he had nothing further to do for them. By sending him the policy to deliver, they made Breck trustee for the plaintiff; they made it a deposit with Breck to the credit of the plaintiff. It was a delivery to Breck to deliver to the plaintiff, which was a good delivery to the plaintiff. Shep. Touch. 58. This is not a question of the authority or acts of an agent; but whether the defendants, by sending the policy to Breck to deliver, did an overt act intended to signify that the policy should have a present vitality. This certainly was such an act. Without any further interference on their part, it would have resulted in actual delivery to the plaintiff. It was intended to signify to the plaintiff not only that the policy was a present contract, but to effect an actual delivery of it to him. *Kentucky Mutual Ins. Co. v. Jenks*, 5 Porter (Ind.) R. 96; 5 Barr, 339; 9 How. 390.

Suppose the defendants had retained the policy, and had merely told Breck to tell the plaintiff that they held the policy subject to the plaintiff's order, would they not have been deemed as holding the policy for the plaintiff?

The defendants next suggest that the plaintiff was ignorant of their acceptance of the risk, of their making out and mailing the policy to Breck until after they had countermanded its delivery, and that the *aggregatio mentium* could not take place until after the acceptance of the proposition by the defendants came to the plaintiff's knowledge, and that before that the defendants had changed their own minds, so that in fact it never did take place, and that consequently there was no legal delivery of this policy.

This involves the more general question, does a contract arise when an overt act is done intended to signify the acceptance of

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a specific proposition, or not until that overt act comes to the knowledge of the proposer? This question may arise upon every mode of negotiating a contract, whether the parties be in each other's presence or not. First comes the mental resolve to accept the proposition; but the law can only recognize an overt act. Whether that act be a word spoken, a telegraphic sign, or a letter mailed, some interval of time, more or less appreciable, must intervene between the doing of the act and its coming to the knowledge of the party to whom it is addressed. In the mean time, what is the condition of affairs? is it a contract or no contract? If the bidder does not see the auctioneer's hammer fall; if the article written for and sent never arrives; if the verbal answer, when the parties are in each other's presence, is in a foreign tongue, or by sudden noise or distraction is not heard; if the telegraphic circuit is broken; if the mail miscarries; if the word spoken or the letter sent is overtaken, and countermanded by the electric current, is there no contract? In the progress of the negotiation, at what precise point of time does mind meet mind, does the contract spring into life?

Upon this subject, with respect to negotiations conducted by written communications, there has been some variety of decision; but it appears to me that the weight of authority, as well as reason and necessity, admit of but one solution.

The meeting of two minds, the *aggregatio mentium* necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party; everything else must be question of proof, or of the binding force of the contract by matters subsequent. The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing or by delivery of the paper, and the delivery may be an act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium*; at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegraph his letter mailed, than he can his words of acceptance after they have issued from his lips on their way to the hearer. If the two minds

do not meet *eo instanti* with the act signifying acceptance, when can they, in the nature of things, ever approach each other more closely? The defendants say, when the act of acceptance comes to the knowledge of the other party. But this knowledge would be a fact without any force, unless we suppose in the proposer a power still of electing not to accept the acceptance. But if we do this, it is apparent that the negotiation is yet precisely in the same stage of development it was in when the first proposition was waiting upon the first answer.

The notion that there is no contract until the acceptance comes to the knowledge of the other party, proceeds upon the ground, in the first place, that the proposal has been withdrawn or lost its force, which is against the intent of the parties and the necessities of the case; and in the second place, upon the ground that the answer is conditional, whereas we suppose it to be absolute. We suppose the acceptor to say not simply I agree, but to say I agree if you do, which requires an answer from the proposer; so that the minds do not meet till he answers. But in the meantime the acceptor may have changed his mind, and for the same reason as before, there is no bargain until this last answer comes to the knowledge of the other party; and so, upon this theory, it must go on *ad infinitum* without the possibility of the *aggregatio mentium* ever taking place. There is in fact no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air; in the other, written signs, carried by the mail or by telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act. *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlop v. Higgins*, 1 House of Lords Cases, 381; *Duncan v. Topham*, 8 C. B. 225; *Potter v. Saunders*, 6 Hare, 1; *Taylor v. Merchants' Ins. Co.* 9 How. 390; *Hamilton v. Lycoming Ins. Co.* 5 Barr, 339; *Vasser v. Camp*. 14 Barb. 341; *Mactier v. Frith*, 6 Wend. 103; *Kentucky Mutual Ins. Co. v. Jenks*, 5 Porter's (Ind.) R. 96. This last case, in all its essential features, is identical with the one before us.

The only English case sustaining the defendants in their view, that I have seen, is that of *Cooke v. Oxley*, 3 Term R. 653,

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which, it will be perceived by the above references, has been effectually overruled in their courts.

In the State of New York, the case of *Mactier v. Frith*, 1 Paige, 434, was reversed in their court of errors by a very large vote (6 Wend. 111), and the doctrine sustained as contended for by the plaintiff.

The only other American case on this side of the question is that of *McCulloch v. The Eagle Ins. Co.* 1 Pick. 278. This last is against the whole current of authorities both in England and in this country, and appears to me requires for the creation of a contract a fact without significance, or a condition that would render its creation impossible.

Let judgment be entered on the verdict for the plaintiff.

See note to *Thayer v. Middlesex Ins. Co.*, ante, vol. 1, p. 333.

ROBERT L. TILTON vs. HAMILTON FIRE INSURANCE CO.¹

(Superior Court, New York City, June, 1857.) *Theft.*

The ordinary fire policy covers losses by theft during the progress of a fire in the insured building.

JOHN ELSTNER vs. CINCINNATI EQUITABLE INSURANCE CO.²

(Superior Court, Cincinnati, June Term, 1857.)

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Where the premises insured were described as a *warehouse*, and were subsequently used as a *candy manufactory*, in which *fire heat* was necessarily employed, and the policy was issued by a mutual insurance company, whose deed of settlement contained a provision, "that no policy shall be so construed as to extend to any house or shop where any trade or business is carried on that requires the use of fire heat, unless the same be mentioned in the policy, and a proportionable deposit paid, to be agreed upon with the directors," and by the act of incorporation the insured becomes a member of the company, subject to all the restrictions of the deed of settlement. Parol proof that at the time the insurance was effected, the insured notified the officers and agents of the company of the intended use of the premises, who knew that fire heat would necessarily be used in the manufactory, is not sufficient proof of an agreement for an insurance to cover that contingency, to entitle the insured to a reformation of the policy so as to cover the loss, the premium actually charged and paid being that proportioned only to the ordinary risks upon a warehouse.

SPECIAL TERM. On motion by plaintiff for a judgment on the verdict, and motion by defendant for a new trial.

The facts are sufficiently stated in the opinion.

STORER, J. The jury, to whom the questions of fact were referred, have returned a general verdict for the plaintiff, and found

¹ 1 Bosw. 367.

² 1 Disney, 412.

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substantially in the affirmative upon the question specially submitted to them by the court,

The plaintiff asks for judgment, and the defendant moves for a new trial.

Two questions were presented, and very naturally arose upon the pleadings, there being two causes of action stated in the petition; one upon a policy of insurance, seeking to recover for an alleged loss by fire, the other in the nature of a bill to reform the policy, on the ground that the real contract between the parties is not stated in that instrument.

The policy was issued on the 13th of August, 1853, and insured the plaintiff from loss by fire upon "that certain five-story brick warehouse, situate on the northwest corner of Vine and Commerce streets, 21½ front, by 93 feet in depth; also the adjoining five-story brick warehouse, on the north, being the same width and depth as the first building, each insured in the sum of \$2,800. For a particular description, or survey, see Application Book No. 2, folio 11." The survey alluded to was in the following words, which is proved to have been made by the authorized agent of the defendant, whose special duty it was to attend to all applications for insurance:—

"Aug. 13, 1853. — John Elstner, a five-story brick warehouse, situate on the northwest corner of Vine Street and Cherry Alley, 21½ feet front and 93 feet deep, 21½ feet of cornice, 26 twelve-light windows, 10 by 18, 3 pair of folding-doors, sash and shutters, 4 hatchways, 4 flights rough steps; room on each floor; valued at \$4,400; premium 1½ per cent. Also adjoining, on the north, a five-story brick warehouse, same width, depth, and same finish as the first; valued at \$4,000; premium 1½ per cent."

On the return of this survey, the policy was made out, and delivered to the plaintiff, who paid the premium. The risk was to be continued for seven years, and it is in evidence the insurance was made at the lowest rates for warehouses, being one quarter per cent. per annum.

After the insurance was made, the plaintiff's tenant, to whom the last described building in the survey, as well as the policy, had been rented, took possession, erected furnaces, by which he carried on the manufacture of candy in the cellar, second and third stories, using fire heat in all. While the building was thus used it was consumed by fire.

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The plaintiff presented his claim for the loss, which was resisted by the defendant, on the ground that a candy manufactory, which required the use of fire heat, was not insured by the policy. It was further objected that, by the deed of settlement, which binds all who are insured in the company, and which is made a part of the contract of insurance by the policy, in express terms it is stipulated in the 10th article, among other things, "That no policy shall be so construed as to extend to any house or shop where any trade or business is carried on that requires the use of fire heat, unless the same be mentioned in the policy, and a proportionable deposit paid, to be agreed upon with the directors."

By the act of incorporation every insurer becomes a member of the company, and is subject to all restrictions imposed by the deed of settlement, and entitled to all the privileges it imparts.

The question then arises, does the policy, by a fair construction of its language, cover the building thus used and appropriated?

We lay out of the case, in this view of the plaintiff's claim, the evidence adduced on trial as to the knowledge of the defendant of the purpose to which the building was applied, and confine ourselves to the consideration of the contract, as it is written and accepted by the parties.

We suppose the property, as described in the policy, is a representation that it will continue to retain that character in all essential particulars until the risk terminates, unless the parties stipulate to the contrary. This rule is adopted to secure the underwriter from all perils he could not be supposed to have contemplated when he subscribed the policy, as well as to hold the insured to perfect good faith on his part. Thus it is said, 4 Mass. 330, *Stetson v. Mass. Mut. F. Ins. Co.*,¹ that where the extent and nature of the risk depends upon the continuance of the premises in the condition in which they were represented, they cannot be altered to the detriment of the insurer, without invalidating the insurance.

It is not, as remarked by Lord Eldon, in 3 Dow, 255, 265, *Newcastle Fire Ins. Co. v. Macmorran & Co.*,² "whether the risk was greater in one building than another; the question for the underwriter is, what is the building, *de facto*, that I have insured?"

So in 3 Coms. 370, *Wall v. E. River Ins. Co.*,³ it was held that the words *occupied as a storehouse* must be construed as a war-

¹ *Ante*, vol. 1, p. 81.² *Ib.* p. 95.³ *Ante*, vol. 3, p. 455.

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ranty, and as such they could only be satisfied by proof of an exclusive occupation.

This case was afterwards on trial in the superior court of New York, and it was attempted to prove, by parol, that the use of the building insured was, by custom, consistent with the ordinary meaning of the language of the policy; but the application was denied; the court deciding that where a contract contained a warranty that the building was occupied exclusively as a storehouse, the evidence rejected would not tend to prove a compliance with the warranty, while it could not be denied that one half of it was occupied exclusively for other purposes. 3 Duer, 278.

There is certainly no difference in principle between the case last cited and the present. Here a warehouse is insured only, there a storehouse. The meaning of both is the same, — the terms are equivalent. The insured, by accepting the policy, agrees that his property shall, for the future, conform to the description it contains; and the underwriter takes the risk upon the understanding that the subject will not be changed from its original character.

No temporary or accidental use of the premises for a purpose not strictly within the ordinary acceptance of the terms used would affect the contract. They are but the exceptions to the rule, and prove its universality. But where the occupation is permanent for another purpose, and while thus appropriated the building is destroyed, it necessarily follows that the risk is at an end; the contract on the part of the insured is changed, and the insurer is discharged from his liability. 6 Cowen, 673, *Fowler v. Aina Ins. Co.*; ¹ 2 Denio, 75, *Jennings v. Chenango Co. Mut. Ins. Co.*; ² 20 Com. 139, *Billings v. Tolland Co. Mut. Ins. Co.*; ³ 2 Hall, N. Y. 589, *Delonguemare v. Tradesman's Ins. Co.*; ⁴ 3 Comst. 122, *O'Neil v. Buffalo F. Ins. Co.*; ⁵ 10 Pick. 535, *Curry v. Comm. Ins. Co.*; ⁶ 26 E. L. and Eq. 238, *Sillem v. Thornton*.

By the tenth article of the deed of settlement, to which we have already referred, the insurers are limited in their powers. Certain risks are not to be taken at all, and others may be taken under special agreement, subject to additional or extra premium.

It is well settled that all the by-laws and conditions prescribed for the government of mutual insurance companies become a

¹ *Ante*, vol. 1, p. 179.

² *Ante*, vol. 3, p. 63.

³ *Ante*, vol. 3, p. 103.

⁴ *Ante*, vol. 2, p. 437.

⁵ *Ante*, vol. 1, p. 289.

⁶ *Ante*, vol. 1, p. 333.

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part of the contract to insure; and each member consents to their full operation whenever he asks to be insured. He then sustains the relation of an underwriter, as well as the party insured, in the premium or deposit he pays; he owns a part of the fund by which he is to be indemnified for future loss to himself, and for which other policy holders are to be paid. Angell on Ins. § 10; 7 Watts & Serg. 348, *Susq. Ins. Co. v. Perinne*; ¹9 Metcalf, 205, *Liscom v. Boston Mut. Fire Ins. Co.*²

The effect, then, of the article restricting the use of fire heat is to prohibit all insurance where that element is employed in the process of, or for the purpose of manufacturing any article of commerce. Such is the clear language of the deed of settlement, and the policy must be controlled by its terms.

It is argued, however, with much force by the counsel for the defendant, that the evidence offered proved the knowledge, on the part of the underwriter, that the building to be insured was to be used for the purpose of manufacturing candy; and that fire heat was an essential instrument in the process of manufacture. The ground thus assumed is not without its equity, and in a proper case would present very strong reasons for interference; but in a case like this, where the effect of admitting the evidence of knowledge would practically be to change or explain by parol a very clear and significant description in the policy, the rule would be ignored which so cautiously guards written agreements from verbal interpolation. To abrogate so important a principle in order to relieve, against possible injury, when there is no ambiguity in the phraseology of the agreement, might introduce consequences more injurious to the administration of the law than the occasional denial of an alleged right.

“The policy itself is considered to be the contract between the parties, and whatever proposals are made, or conversations had between them, prior to the subscription, they are to be considered as waived if not inserted in the policy, or contained in a memorandum annexed to it.” 13 Mass. 96, 98, *Higginson v. Dall*. See, also, 1 Duer on Ins. § 16, and note to page 132.

This rule is adopted by the supreme court of Ohio, in 18 Ohio, 116, *Harris v. Col. Co. Mut. Ins. Co.*,³ where it is held that parol evidence cannot be received to show that in fact the insured or his agent knew the true state of facts.

¹ *Ante*, vol. 2, p. 339.² *Ib.* p. 393.³ *Ante*, vol. 3, p. 116.

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In the late case, 3 Gray, 588, 585, *Lee v. Howard F. Ins. Co.*, the doctrine is very clearly stated by Bigelow, J.; we use his language: "It must be presumed conclusively, that the whole engagement of the parties, and the extent and mode of their undertaking, was reduced to writing, and all evidence of a previous *colloquium* is incompetent. This wise and salutary rule cannot operate harshly upon parties who read and understand their written agreements before executing them." See, also, 7 Cush. 175, *Barrett v. Union Mut. F. Ins. Co.*; ¹ 30 E. L. & Eq. 496, *Loughor C. & R. W. Co. v. Williams*; 8 Cush. 183, *Lowell v. Middlesex Mut. F. Ins. Co.*²

There has been what would seem to be a partial suspension of the rule, by the courts of Pennsylvania, where the mistake or error of the surveyor has caused the misdescription of the premises insured; but even there, the cases rest upon the fact that the error could have been readily rectified by an examination of the premises as to their structure or size, or the existence of other buildings contiguous. They do not reach a case where the property itself, once described fully and clearly, can be made to assume a new character, or change the received meaning of terms in common and ordinary use. Moreover, there is no court of equity in Pennsylvania, and the powers of the common law judges, as to the reformation of contracts, are limited.

We have come to the conclusion, therefore, that the action cannot be sustained upon the contract as it is embodied in the policy.

The second cause of action presents the question, whether the policy contains the contract as really made and intended by the parties; for if there has been any mistake, error, or omission, we do not doubt but it is our duty to reform the instrument, and remit the plaintiff to all his original rights?

There must, in all such cases, be mutual mistake, by the accidental omission or insertion of a material stipulation, contrary to the intention of the parties. The terms employed in the policy must be such as do not express the true intention and understanding, both of the insured and the underwriter, and a strong case must be made before the court will disregard the language of the contract and give it a new interpretation.

But the mistake must be manifest, and the evidence to prove

¹ *Ante*, vol. 3, p. 199.

² *Ib.* p. 240.

it be very clear. 1 Arnould on Ins. 51, 52; 2 Phillips on Ins. § 1937. Indeed, it is said that the only well authenticated instance in which the English chancellor has exercised the power to reform a policy, is in 1 Atkyns, 545, *Motteux v. London Ass. Co.*, where Lord Hardwicke held that the contract might be corrected by the label or previous memorandum between the parties. The same chancellor refused to interfere, a few years afterward, in 1 Ves. Sen. 317, *Henkle v. Royal Exch. Ass. Co.*, regarding the evidence as not sufficient to vary the contract.

In the United States, the power is fully admitted, and in every proper case exercised, by the chancellor. Thus, in 2 Cranch, 419, *Graves v. Boston Mar. Ins. Co.*; 3 Mason, 6, *Andrews v. Essex Fire & Mar. Ins. Co.*; 2 Johns. Ch. 631, *Lyman v. United States Ins. Co.*; 1 Washington C. C. 419, *Hogan v. Delaware Ins. Co.*; 1 Paige, 278, *Phoenix F. Ins. Co. v. Gurnee*; 3 B. Mon. 231, *Franklin F. Ins. Co. v. Hewitt et al.*; ¹ 18 Ohio, 116, *Harris v. Col. Co. Mut. Ins. Co.*; ² *Ib.* 459, *Suydam v. Col. Ins. Co.*

The cases we have referred to, without exception, demand from the party asking the chancellor to interfere, the clearest evidence of his right; if there is any reasonable doubt as to the agreement, any misunderstanding of its terms, any want of proof as to the mutual mistake of the contracting parties, no relief has been given.

We find no difficulty in answering the objection made by the defendants' counsel, when he insists no valid insurance can be made by the defendant unless evidenced by a policy issued in due form. We suppose the policy is but evidence of the contract, and can alone furnish a legal right of action; but as in every other case, where the agreement is clearly established, and between the parties mutual engagements are made, we must hold the insurer responsible if there is evidence that a proposition to insure was made, accepted, and the premium fixed. The objection seems to be founded upon a decision of the supreme court, 16 Ohio, 148, *Cockerill v. Cin. Mut. Ins. Co.*, an opinion, we apprehend, not strictly applicable to the question before us, and which must not be extended further than the strictest comity on our part may demand. The rule as there announced is subject to many limitations, and may well be reconciled with the principle we have intimated.

¹ *Ante*, vol. 2, p. 202.

² *Ante*, vol. 3, p. 116.

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It is a familiar doctrine in equity, that in every case where a contract is sought to be reformed, parol evidence of its terms is admitted, else the agreement must remain as it is written. The reason of the rule applies to all suits for equitable relief. There can be no exception. In the late case, 19 Howard, 318, *Com. Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, Curtis, J., very clearly lays down the principle, and sustains his reasoning by a quotation of the American cases. This we regard as the law of the contract between the parties before us.

On the trial of this cause, the testimony offered to prove the alleged mistake was submitted to the jury, the court having directed an issue for the purpose of establishing the facts upon which their judgment in the premises should be formed.

The verdict substantially finds that the plaintiff, when he applied for insurance, fairly stated the purposes for which the building was to be appropriated, that it was occupied, as it was afterward proved to be, and that fire heat was known to be necessary to carry on the business of a candy manufactory.

If there were any doubts as to the certainty of the proof, the finding of the jury has removed them; and the only question for us now to determine is, whether there is satisfactory evidence of another contract than that contained in the policy, existing at the time it issued.

We have no doubt that the plaintiff believed he was insured, as he claims to have been; and the jury have determined that the defendant, through "their authorized agents, were informed of the real condition of the premises." But to give the plaintiff the relief he seeks, this understanding, information, and knowledge must have taken the shape of an agreement which either party might legally enforce. The preliminaries may have been ascertained, the object known, and the nature of the risk disclosed, yet these elements do not constitute a contract. There must have been an equivalent agreed to be paid, for the indemnity about to be furnished. It is well settled that before the premium is paid, or agreed to be paid, or secured to be paid, no liability on the part of the insurer exists; and where no fixed sum is agreed upon, or referred to, and there is no regular specific rate known to the parties that is determined by the nature of the risk, it would seem there could be no valid contract. If, in such a case, the assured should seek to enforce the agreement,

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what sum must he have tendered, or be able to tender, as premium, in order to perfect his right? Where the parties have agreed upon no such sum, and its payment is a condition precedent to the liability of the underwriter, can the court determine it? If they could, by what rule are they to be governed? What shall be the limit of their discretion? 1 Sch. & Lef. 22, *Clinan v. Cooke*; 14 Ves. 406, *Milnes v. Gray*; 2 Wheat. 336, 341, *Colson v. Thompson*.

The exercise of such a power would be to transfer the duty of the officers and agents of the insurers to the court, and claim for them the discretion to make a contract *de novo*.

Such, we believe, is not our function. We may reform an agreement so that the parties shall be required to do what they originally intended; but we can create no liability where none originally existed. If there never was any valid contract between the parties, we cannot cure the defect by our decree.

In this case, it is not denied that the premium paid was at the lowest rate for a warehouse only. The tenth article of the deed of settlement, to which the plaintiff and defendant were alike parties, forbade the insuring of property to be used or appropriated to the manufacturing of articles requiring fire heat, unless in special cases, by the consent of the directors, and for an additional premium to be paid.

If, then, we admit all that is proved, and all even that is claimed by the plaintiff, no such premium was ever fixed, or agreed to be paid, and no such assent given to the risk by the directors, as the policy and the deed of settlement required.

We are compelled, very reluctantly, to hold that we cannot grant the relief sought by the plaintiff. Before we can reform the contract existing at the time of the loss, we must have satisfactory evidence that there was another valid agreement by which the former can be rectified.

We must be permitted to remark, that though satisfied that there was a mutual misunderstanding between the parties to the policy, and while there is no ground to suppose there has been intentional error, it seems to us that the morality of the contract would be better vindicated by the voluntary adoption of the understanding of the plaintiff, so clearly proved to the jury, as the basis of the claim to indemnity.

It is not for us, however, to decide a question *ex cathedra*, where

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we have no right, judicially, to enforce our opinion. We leave the parties as we find them. We decline to give the relief sought by the amended petition, and order a new trial upon the general verdict.

New trial granted.

CHARLES IRVING vs. EXCELSIOR FIRE INSURANCE CO.¹ (Superior Court, New York City, July, 1857.) *Preliminary Proofs.*
— *Misrepresentation.* — *Partners.*

The insured cannot upon the trial impeach the correctness of his preliminary proofs. The general rule is, that the assured (in stock policies) is not bound to disclose the nature of his interest, whether legal or equitable, whether a distinct or an indistinct share, unless such disclosure is material to the risk. When there is an insurance of a person upon "his stock of goods" in a specified store, and it not only appears that he is carrying on business there as a sole trader, but that other business is carried on in the same store by himself and others as copartners, the insurance will be confined to his sole and separate business; but when, as in this case, the only property answering the description in the policy, i. e. the only goods in the premises, are his in the sense disclosed by the proof in this case, the policy will be held to relate to them.

If one of several partners insure in his own name only, it will protect his individual interest only. Where there are general words which will admit of application to an alleged intent to insure the joint interest, though the policy be in the name of one only, extrinsic proof may be given to show whether the insurance was intended by the assured to cover his interest only, or that of his partners also.

KASSIMIR VOGEL vs. PEOPLE'S MUTUAL FIRE INSURANCE CO.²

(Supreme Court, Massachusetts, September Term, 1857.)

Title. — Prohibited Use of Premises.

An applicant for insurance on personal property, who has made, but not delivered, a bill of sale thereof, taking in return only a promissory note secured by mortgage thereon, may truly represent and warrant himself to be the owner thereof.

A policy of insurance on the machinery in a silk factory, which provides that it shall be of no effect while the premises shall be used for storing "cotton in bales," "rags," or "wool," or for a "cotton mill," "woollen mill," or other "manufacturing establishment or trade requiring the use of heat," is not avoided by using one room for weaving a few pieces of stuff from woollen and linen thread and cotton, spun elsewhere and kept in the room.

ACTION of contract upon a policy of insurance for one year from the 17th of August, 1854, on the machinery in the plaintiff's silk factory.

Trial before Bigelow, J., who made the following report thereof: —

The building and machinery were destroyed by fire on the 22d of August, 1854, and this action was commenced on the 24th of April, 1855. The conditions of insurance, which were made part

¹ 1 Bosw. 507.

² 9 Gray, 23.

of the policy, provided that no action against the company should be sustainable on the policy, unless commenced within four months after any loss. The declaration averred that the defendants had waived this condition. The answer denied such waiver, but did not set up the condition as a distinct ground of defence; and the plaintiff therefore contended that it could not be relied on as a bar to the action. But the judge ruled that this defence was open, and that the action was barred unless a waiver was shown.

The plaintiff in his application, which was expressly "made a part and portion of this policy and warranty on the part of the assured," stated that he was the owner of the property. The defendants denied the truth of this statement. It appeared that the plaintiff, before the making of the policy, and to prevent the machinery from being attached by his creditors, made a bill of sale thereof, which was never delivered, and received no consideration therefor, except a promissory note for \$1,800, and a mortgage to secure the same, which he still held; and that the bill of sale and mortgage were recorded in the town clerk's office. The judge ruled that this evidence did not maintain this defence.

On the face of the policy was the following clause: "And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall, at any time after the making, and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or indorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, used, or occupied, these presents shall cease, and be of no force or effect." In the "classes of hazards" annexed to the policy, "cotton in bales," "household furniture," "rags," and "wool," were specified as "hazardous;" "rag stores" and "upholstery manufactories" as "extra hazardous;" and in the "memorandum of special hazards," "cotton mills," "metal and other mills of all kinds,"

"woollen mills, and generally all manufacturing establishments and all trades requiring the use of fire heat, not before enumerated."

The defendants introduced evidence that the building was occupied by the plaintiff as a silk factory, except one room about thirty feet square in the lower story, which was occupied by Daniel Humphrey for the purpose of weaving carpets and pantaloons; that at the time of the fire and for a month previous, Humphrey worked there and employed two or three hands to work there besides himself; that there were two looms for weaving in the room, one for carpets and one for pantaloons, both of which were made of woollen and linen thread, spun elsewhere and brought there to be woven, and kept in said room; that before the fire three pieces of carpeting, containing fifty or sixty yards each, and seven pieces of pantaloons, had been made there; that during most of the time that Humphrey had been in the occupation of said room he had been trying experiments in weaving, and had made many alterations from time to time in his looms in order to try such experiments; that some cotton was kept in the rooms and used in the manufacture of carpets and pantaloons; and that Humphrey had no lease of the room, nor was there any agreement for a specified rent, but he was to pay the plaintiff for the use and occupation of it what he thought fair. Upon this evidence the judge ruled that the plaintiff could not recover, and directed a nonsuit, subject to the opinion of the whole court.

BIGELOW, J. 1. The plaintiff by his declaration dispensed with any averment in the answer that the action was barred by lapse of time. The allegation of a waiver of such bar by necessary implication admitted its existence, and put the issue solely on the question of waiver. It was sufficient therefore for the defendants to meet the issue thus tendered him by the plaintiff by denying in clear and distinct terms that any such waiver had been made.

2. The facts relied on to show that the plaintiff was not the owner of the property insured at the time of making application for the policy, and that his statements in this particular were false, do not sustain this ground of defence. The bill of sale was without consideration and had never been delivered, nor had the property, either actually or constructively, ever passed out of the plain-

What Policy covers. — Evidence. — Buildings. — Use of Premises.

tiff's possession. It is clear that as between vendor and vendee there had been no such delivery as to pass the property ; *a fortiori*, there was none to change the title as respects third parties.

8. The remaining ground of defence, that the policy was void because the premises had been used for purposes "denominated hazardous, extra hazardous, or included in the memorandum of special hazards, and not specified in the policy," is not sustained by the proof. It does not appear that the use of a single room in the building in the manner proved at the trial comes within any of the prohibited hazards which cannot be incurred without special leave. The premises were not used as a "cotton mill," "woollen mill," or a "manufacturing establishment requiring the use of heat," nor for "storing cotton in bales," or "wool." These are the only occupations enumerated among those which are called hazardous, extra hazardous, or specially hazardous, which in any aspect of the proof could be said to resemble those which were carried on in the premises insured ; but the evidence falls short of proving that the building was actually used during the existence of the policy for any of them.

New trial ordered.

JEFFERSON WHITE vs. MUTUAL FIRE ASSURANCE CO..¹

(Supreme Court, Massachusetts, September Term, 1857.)

What Policy covers. — Evidence. — Buildings. — Use of Premises.

A policy of insurance on a "dwelling-house and wood-house," described in the application as "occupied for the usual purposes," covers a building, built at one time, with a single frame and roof, and designed for one building, for a carriage-house and wood-house, of which the wood-room constitutes two thirds, and is separated from the carriage-room by a loose partition extending to the eaves on one side, and half way to the roof on the other ; and does not exclude evidence that the whole building was called by the tenants and neighbors the "wood-house."

In the trial of an action on a policy of insurance upon a building in which was a quantity of straw at the time of the fire, the defendants cannot, "for the purpose of showing the condition of the straw at the time," introduce evidence that three weeks previously a bonfire was made by boys outside of the building, with a trail of straw from it to the building, in which loose straw was then lying.

A hog-pen and hen-house, from three and a half to six feet high, covered with boards, with a partition of boards between them, are not a building within the meaning of an application for insurance, which represents that there are no buildings not disclosed within a certain distance ; and evidence that they increased the risk is inadmissible.

The insurance of a landlord who uses reasonable care and diligence in the selection of tenants and the management of the premises is not affected by his tenants keeping straw on the premises without his knowledge or assent, so as to increase the risk.

¹ 8 Gray, 566.

ACTION of contract on a policy of insurance issued in 1853, for six years, on the plaintiff's "brick dwelling-house and wood-house situated at Chicopee," under the conditions and limitations expressed in the by-laws annexed thereto, one of which provided that "if the assured shall alter or enlarge a building or appropriate it to other purposes than those mentioned in the policy, so as to increase the risk, the same shall become *ipso facto* void."

In the application "to which," by the policy, "reference may be had," the property insured was described as in the policy, and as "occupied for the usual purposes, by a tenant;" and the applicant, under the printed head of "Relative situation as to each other and as to other buildings," made this statement: "House and wood-house connected. No other buildings within four rods except the ice-house."

Answer. The existence of a carriage-house adjoining the wood-house, and of other buildings within four rods of the premises, not disclosed in the application; and the use of the premises for keeping straw; all of which increased the risk. Trial in the court of common pleas in Hampden, at October term, 1856, before Bishop, J., who, after verdict for the defendants, signed a bill of exceptions, of which the material parts were as follows: —

"There was evidence that the dwelling-house and wood-house building were built by Elihu Adams in 1839; the whole of the wood-house building was built at one time, had but one frame, was all under one roof, and Adams testified that it was designed for one building, for a wood-house and carriage-house; the wood-room constituted two thirds or more of the entire building, and was separated from the carriage-room by a loose partition, about seven feet high, which extended to the eaves on one side, and not so high on the other side, leaving a distance of about seven feet between the top of the partition and the ridge pole. There were large cracks and holes between the boards of the partition, through which one might look from one room into the other, and the carriage-room was open on the east side, but the wood-room was inclosed on all sides.

"It appeared in evidence that in June, 1854, at about three o'clock P. M., a fire was discovered in the carriage-room, and consumed the wood-house building, damaged the back part of the dwelling-house, and consumed the ice-house, hog-house and hen-house, hereafter mentioned. It also appeared that in the car-

riage-room there were from four hundred to one thousand pounds of straw, which was scattered about and trod down on the ground, there being no floor in the room, and which had been put there without the knowledge or assent of the plaintiff in the fall or winter previous by one Fuller, who then occupied part of the plaintiff's house, but moved out in the April before the fire, and was succeeded by another tenant. The plaintiff proved that from 1849, when he purchased the premises from Adams, to the time of the fire, no cattle were kept in said carriage-room, and no straw, hay, or other similar articles were put there, except the straw put there by Fuller, as before stated. The plaintiff resided in Enfield, twelve or fifteen miles from the insured premises, and never personally occupied said premises, but rented them, and visited them from time to time for the purpose of collecting rents and looking after the premises.

"The plaintiff offered to prove by several witnesses, some of whom had been tenants of the premises, and others near neighbors, that the building in which the wood-house and carriage-room were had always been commonly known and called as the 'wood-house.' But the court rejected the evidence.

"The defendant called Mrs. Jewett, who testified that she lived nearly opposite the insured premises; that about three weeks before the fire she saw from her house a bonfire near the carriage-house; that she went out, and found that the fire was made of straw, and that there was a trail of straw from the carriage-house to the fire; that she separated the burning from the other straw, and put the fire out; that the carriage-house was open, and loose straw was lying there; that her little boy and the child of one of the tenants made the fire. To this evidence the plaintiff objected; but for the purpose of showing the condition of the straw at the time, and for no other purpose, the testimony was admitted.

"It appeared in evidence that in the rear of the building containing the wood-room and carriage-room, and separated from said building by a passage-way three feet wide, was an ice-house, and that in the rear of the ice-house, and distant from it one or two feet, was a small structure, called by some of the witnesses a hog-house and hen-house, being three and a half feet high in the rear, and six feet high in front, and covered by boards, but not shingled or battened, and with a board fence or partition between

the hog-house part and the hen-house part. It extended towards the barn and to within about twenty-four feet of it.”

The defendants were permitted, notwithstanding the plaintiff's objection, to introduce evidence that the hog-house and hen-house increased the risk, and would, if disclosed, have increased the premium.

“The plaintiff contended that, as it appeared from the application that the insured premises were to be occupied by tenants, there was an implied agreement on the part of the defendants, that if the plaintiff used reasonable care and diligence in the selection of trustworthy tenants, and in the general management of the premises, the insurance should not be affected by acts done by the tenants without his knowledge or consent, and he asked the court to instruct the jury that, if they were satisfied that the plaintiff used such reasonable care and diligence, and did not assent to or know of Fuller's putting and keeping the straw in the carriage-house, the fact that the straw was thus put and kept there by Fuller would not prevent the plaintiff from recovering, even if the straw being there did increase the risk. But the court declined so to instruct the jury.

“The plaintiff also asked the court to instruct the jury that, as the policy and by-laws nowhere specifically prohibited the keeping of straw on the premises, it was not a violation of any of the provisions of said policy and by-laws if the plaintiff's tenant did keep said straw there, provided he kept it only in reasonable quantities, and for his own use. But the court declined so to instruct the jury; and instructed them, that if the straw materially increased the risk, it was a violation of the policy, and worked a forfeiture of the plaintiff's claim under it.

“To the foregoing rulings and instructions the plaintiff excepts.”

THOMAS, J. 1. The description of the premises in the evidence, fully detailed in the bill of exceptions, very clearly shows that the “wood-house” covered and included the room in which the straw was deposited. We perceive no ground for saying that this room, designed for a carriage-room, was a building, so as to make the application false when it stated there was no other building within four rods of the premises insured except the ice-house. But the evidence that the building which covered and included the wood-room and carriage-room was known and called

Ashes.

by the tenants and neighbors the "wood-house," though not necessary, was competent.

2. The evidence of Mrs. Jewett as to the bonfire of straw three weeks before the fire was immaterial, because the fact it tended to prove, and to which its effect was limited by the learned judge, was itself immaterial. From its manifest tendency, also, to prejudice the cause of the plaintiff, it should have been excluded.

3. Whether the pig-pen and hen-house were buildings within the terms of the application, — "no other buildings within four rods," — would depend upon their size and structure. Upon the evidence given in the bill of exceptions they were not buildings, within the meaning of the application; and evidence as to increase of risk from them was not competent.

4. The instructions prayed for should in form or substance have been given. There was nothing in the acts of the tenant, as proved, which avoided the policy. The instructions given were unsound, for the same reason. *Exceptions sustained.*

CITY OF WORCESTER vs. WORCESTER MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, September Term, 1857.)

Ashes.

An application by a town for insurance on a school-house stated, in answer to an interrogatory, that the ashes were taken up in metallic vessels which were not allowed to stand on wood with ashes in them, and that the ashes, if deposited in or near the building, were in brick or stone vaults; and concluded with a memorandum that "if ashes are allowed to remain in wood, the insurers will not assume the risk;" and was made part of the contract of insurance. There were no vaults of brick or stone, and the ashes were generally deposited on the ground, at a distance from the building; but the boy employed by the school committee to take charge of the building, for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the school-house. *Held*, that the insurers were discharged.

ACTION of contract on a policy of insurance, dated February 10, 1855, upon a school-house against loss by fire, "according to the true intent and meaning of" the rules annexed to the policy, and the application for insurance, which was made part of the contract.

By those rules, "policies shall become void and of no effect for any of the following causes or reasons, to wit: —

"If the application shall not contain a full, fair, and substan-

¹ 9 Gray, 27.

Ashes.

tially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured, and material to the risk.

"Or if the assured shall withhold or conceal any such material facts or circumstances within his knowledge.

"Or if the state of things in or about the buildings insured be so altered or changed by the advice, consent, or procurement of the assured, as to cause a material increase of the risk.

"Or if a loss shall happen through the gross, wanton, or wilful misconduct of the assured, or through his gross or culpable negligence, or by means of his intoxication."

The twelfth interrogatory in the application was this: "Are your ashes taken up in metallic vessels which are not allowed to stand on wood with ashes in them? And if deposited in or near the building, in vaults of brick or stone?" The answer to both these questions was in the affirmative.

At the end of the application, immediately above the signature, was the following: "NOTE. If ashes are allowed to remain in wood, or if fireplaces where stoves are substituted are not well secured by incombustible materials, and the wood where stove-pipe is carried near to it is not thoroughly protected, the company will not assume the risk."

The parties admitted the execution of the policy and application; the destruction of the school-house by fire on the 12th of January, 1856; and the right of the plaintiffs to recover, unless the following facts, with such inferences as might be drawn therefrom, constituted a defence.

"About six weeks before the destruction of the building a school was opened therein and kept until the building was destroyed. A boy was hired to make the fires and take charge of the school-house during the continuance of the school; but no directions were given him by any one as to the disposition of the ashes. For almost three weeks from the opening of the school he threw them into a pile on the ground, a rod or more from the building; but two or three weeks before the burning of the building, a legal voter of the district in which the school-house was situated placed a wooden barrel in the wood-house which adjoined the school-house, and in which the wood for fuel was kept, and agreed with the boy to pay him a stipulated price if he would put the ashes, as they accumulated, in the barrel, which the boy

Ashes.

from that time did, until the building was destroyed. There were no vaults of brick or stone, or other incombustible material in or about the school-house, or provided elsewhere for the deposit of the ashes. The wood-house was a building of wood, and it was in flames when the fire was first discovered, and before it had reached the school-house.

"The prudential committee of the district at the time of the destruction of the school-house, who had held the same office in the previous year, soon after the school for the winter of 1854-55 was opened, directed the person who then made the fires to throw the ashes upon the ground on the spot before referred to, and his directions were complied with during that winter."

DEWEY, J. The answers and stipulations contained in the application of the plaintiffs for their policy are made an essential part of the contract between these parties. To the twelfth interrogatory, the plaintiffs by their answer had stated that "their ashes were taken up in metallic vessels, which were not allowed to stand on wood with ashes in them, and that, if deposited in or near the building, they were deposited in vaults of brick or stone." Upon the face of the application, and above the signature of the defendants to the application, was the following: "If ashes are allowed to remain in wood, the company will not assume the risk." This policy was therefore directly affected by the manner in which the plaintiffs used the insured property in reference to the stipulations above referred to. It is conceded that the plaintiffs had no vaults of brick or stone for the deposit of ashes. Had they had such, and had the usual course been to deposit their ashes therein, an unauthorized departure in one or two instances by their servant might not have affected the policy. But under the circumstances of the present case, placing the ashes for a period of two or three weeks continuously, and up to the time of the loss by fire, in a wooden barrel in the wood-house, which adjoined the school-house, and in which the fuel for the school-house was kept, by the agent employed by the defendants to make the fires and take charge of the school-house, was in direct violation of the terms of the contract for insurance, and must preclude the plaintiffs from recovering for the loss which has occurred.

Judgment for the defendants.

Repeated Attempts to destroy Property. — Other Insurance.

DAVID CLARK & another vs. HAMILTON MUTUAL INSURANCE CO.¹

(Supreme Court, Massachusetts, October Term, 1857.)

Repeated Attempts to destroy Property. — Other Insurance.

Omission to disclose to insurers repeated incendiary attempts to destroy the property insured will not avoid the insurance.

In an action on a policy of insurance, in which the defence relied upon is a subsequent insurance contrary to the terms of the first policy, the burden of proving that the two policies covered the same property is upon the defendants.

A policy of insurance upon "carpenter's shop and carpenter's tools" provided that the issuing of any other policy covering any portion of the property insured, and not disclosed to these insurers, should avoid this policy: *Held*, that evidence of the issuing of another policy to the same person upon "four chests of carpenter's tools in wood shop," described as situated in the same street as in the first policy, and that there were in the shop two chests of tools belonging to the assured, and two or perhaps three belonging to their journeymen, did not show that any part of the property was covered by both policies.

ACTION of contract on a policy of insurance issued by a mutual insurance company on the 1st of July, 1852, to the plaintiffs upon "carpenter's shop, carpenter's tools," hardware, fixtures, and lumber, in "Brattle Place," West Cambridge, "subject to the provisions, conditions, and limitations of the charter and by-laws of said company, and the lien on the interest of the person insured in any personal property or buildings covered by this policy, and the land under said buildings," which the company expressed their intention to rely upon.

The by-laws of the company, which were printed upon the policy, contained these provisions: Art. 11. "If the insured shall refuse to pay any assessment, or if for any other cause the continuance of the risk is considered unequal or injurious to the company, the directors may terminate the same." Art. 14. "If the risk on any property insured by said company shall be increased by any change of the circumstances disclosed in the application, or by the erection or alteration of any building, the carrying on of any hazardous trade, or the deposit of any hazardous goods in or near the same, the policy thereon shall be void," unless confirmed in writing by the directors. Art. 18. "In case any other policy of insurance has been or shall be issued, covering the whole or any portion of the property insured by this company in any policy, the policy issued by this company shall be void, although such other policy shall be void also, unless the

¹ 9 Gray, 148.

Repeated Attempts to destroy Property. — Other Insurance.

directors shall have been notified of such other policy, and given their consent thereto in writing signed by the president and secretary."

At the trial before Merrick, J., the defendants offered to prove, and it was admitted that they could prove, if competent, that, after they made this policy, "attempts had been made on three several and distinct occasions by some person or persons unknown, other than the plaintiffs, to set fire to and burn the shop of the plaintiffs; and no information of these facts was communicated by the plaintiffs to the defendants, until after the plaintiffs' shop and all the tools contained therein had been consumed and destroyed by fire, set by an unknown incendiary." The defendants also offered to prove, by experts in insurance risks and hazards, that such incendiary attempts were a material change in the circumstances of insured property, and materially increased the hazard of insuring it. The evidence offered was rejected.

The defendants introduced and read to the jury a policy of insurance issued by the Hampden Stock and Mutual Fire Insurance Company to the plaintiffs on the 17th of August, 1854, on "four chests of carpenter's tools in wood shop in West Cambridge," and "predicated upon an application or survey," which was made a part of the policy, and described the property insured as situated in "Brattle Place," and had indorsed upon it the following: "Remarks of Agent. Messrs. Clark & Burr wished me to file an application to insure this property; they employ ten hands, four or five of which work in the immediate neighborhood, so that their chests remain in the shop; and Messrs. C. & B. think that this insurance will render their hands contented and not so liable to change places.

"Isaac H. Damon, Agent."

The plaintiffs contended that the tools insured by the Hampden Company were not the same insured by the defendants, but belonged to certain journeymen in the plaintiffs' employment, for whose benefit that insurance was obtained. It appeared that at the time of that insurance and of the fire, there were in the shop two chests of tools belonging to the plaintiffs, and also two and perhaps three chests of tools belonging to workmen in their employment.

Damon, and Clark, one of the plaintiffs, were called as witnesses, and testified that Damon filled out that application, and

forwarded it to the defendants at Springfield, after being requested to obtain insurance for the plaintiffs on four chests of tools belonging to journeymen in their employment. On cross-examination, Damon testified that he made no other communication to the Hampden Company than the writing on the application, and that so far as he knew, they had no knowledge that their policy was to be on the tools of journeymen employed by the plaintiffs; and Clark testified that when he signed that application he supposed it related to and corresponded with the tools of the journeymen. All this evidence was objected to by the defendants, but admitted.

The case was then reserved for the full court, the parties agreeing that if the facts concerning the attempts to set fire to the shop and the plaintiffs' omission to make them known to the defendants constituted no defence to the action, and if the evidence concerning the journeymen's tools and the application to the Hampden Company was competent, and, taken in connection with the two applications and policies, was sufficient to show that the two insurances were not upon the same tools, judgment should be rendered for the plaintiffs; otherwise for the defendants.

THOMAS, J. This is an action upon a policy of insurance. There were two grounds of defence. The first was a change in the circumstances of the insured property, materially increasing the risk, and not communicated to the defendants. This alleged change of circumstances consisted in attempts on three distinct occasions to set fire to the shop insured. The court rejected the evidence, with the idea probably that the object of the policy of insurance was protection against loss by fire, — fires kindled by incendiaries included.

The second ground of defence was a subsequent insurance on the same property, without notice to the defendants. The question of fact which arose was, whether the property insured in the second policy was the same as that insured in the first. Upon this point the testimony of the agent of the second insurance company and one of the plaintiffs was admitted of the declarations, made at the time of insurance, as to what property the plaintiffs desired to have their policy cover. We think the admission of this evidence was an error. The contract in writing could not be so controlled.

Repairs by Insurer.

But we think also that the burden of proof was upon the defendants to show that the property insured in the second policy was the property insured in the first policy ; that upon the evidence reported this burden was not discharged ; and that, upon the competent evidence in the case, it does not appear that the property was the same. The result, however, is to send the case back for a

New trial.

JOHN G. M. PARKER vs. EAGLE FIRE INSURANCE Co.¹

(Supreme Court, Massachusetts, October Term, 1857.)

Repairs by Insurer.

Under a policy of insurance on a building against fire, which provides that the insurers may "make good the damage by repairs, and the insured shall contribute one fourth of the expense," if the insurers, intending to comply with this provision in good faith, make repairs of substantial benefit, though not fully making good the loss, the measure of the assured damages is the difference between the value of the building as repaired, and what it would have been if fully repaired ; deducting one fourth of their value to the estate.

ACTION OF CONTRACT to recover a loss by fire under a policy of insurance upon three wooden houses, "under the conditions and limitations expressed in the by-laws" annexed to the policy, the sixteenth of which provided "that the company shall have the right to make good the damage by rebuilding, replacing, or repairs ; and the insured shall contribute one fourth of the expense of rebuilding or repairing."

At the trial in this court, the defendants admitted a partial loss ; but contended, and offered evidence tending to prove, that they had repaired it and made it good according to that by-law. The plaintiff offered evidence tending to show that the repairs made by the defendants were not sufficient to make good the loss.

The defendants requested the following instruction : "If the jury shall find that the defendants did repair the buildings injured by fire, but not in such a perfect manner as to make them as good as before the fire, then the measure of damages is the sum which the plaintiff is damaged by the insufficiency of the defendants' repairs." But Merrick, J., refused this instruction ; and instructed the jury, "that the defendants having undertaken to make good the plaintiff's loss, by replacing, rebuilding, and repairing, if they had not fully done this, so as to make the build-

Submission to Arbitration. — Waiver.

ing substantially as good as before the fire, no deduction should be made from the damage originally done to the plaintiff's buildings by fire, for any repairs made by the defendants; and if the defendants had not fully made good the plaintiff's loss by their repairs, then the jury should give the same damages to the plaintiffs as if no repairs had been made." The jury returned a verdict for the plaintiff for his full damages, and the defendants excepted to this ruling.

THOMAS, J. The defendants were to repair the buildings under the contract between the parties, made by the by-laws. It was a contract to be performed upon the real estate of the plaintiff, and the usual rule as to labor and materials furnished upon real estate applies. The labor done and materials furnished in building, and in the repair of buildings, become incorporated with and additions to the real estate of the owner. If therefore the repairs were made with the purpose of complying with the by-law in good faith, and were of substantial benefit to the plaintiff, the defendants should have the advantage of them, though not so perfect as fully to make good the plaintiff's loss. The difference between the value of the buildings as repaired in fact, and what the value would have been had the repairs been full and complete, is the measure of damages in the case.

It is to be observed that under the by-law one fourth of the expense of the repairs is to be borne by the insured. In a case where the repairs are imperfect, he should bear not one fourth of the cost of repairs, but of their value to the estate.

Exceptions sustained

SAMUEL M. PETTENGILL vs. EDWARD W. HANKS & another & trustees.¹

(Supreme Court, Massachusetts, October Term, 1857.)

Submission to Arbitration. — Waiver.

Evidence of a submission by the assured and an agent of the insurers of the amount of a loss by fire to arbitration is not sufficient evidence of a waiver of a condition in a policy of insurance requiring a particular account of the loss, to charge the insurers in foreign attachment as trustees of the assured, if they state in their answers that they have never waived the conditions of the policy.

TRUSTEE PROCESS. The Traders' & Mechanics' Mutual Fire Insurance Company, and the Howard Mutual Fire Insurance

¹ 9 Gray, 169.

Submission to Arbitration. — Waiver.

Company, both of Lowell in this county, summoned as trustees of the principal defendants, in their answer admitted a loss by fire of property of the defendants in Boston, insured by them; but stated that the defendants had never delivered to them a particular account of the loss, as required by the conditions of insurance made part of each policy. In answer to interrogatories put to them by the plaintiff, they further stated that they had notice of the fire from an agent of theirs; that an officer of each company visited and examined property injured by the fire, and for the sole purpose of ascertaining the extent of the injury while the fire was recent, agreed to the appointment of three persons to estimate it; but that he did not intend to bind the company by such appraisal, or to waive any of the rights of the company, and had no authority to bind them by a submission to arbitration, and that the company never assented to the appointment of arbitrators.

At the trial in the court of common pleas, the plaintiff called a witness, who testified that he was called upon to act as arbitrator on the part of the plaintiff between him and the insurance companies, and met at the place of the fire those officers, and an arbitrator selected by them on the part of the companies, who, together with the witness, selected a third, and those officers agreed to abide their decision; that the witness looked at the policies, and remarked that they provided another mode of assessing damages and giving notice, and said officers said it would make no difference, that they were anxious to ascertain the loss as they wished to pay up; that the arbitrators made an award with which the officers were satisfied, and one of them said he was going to Lowell, and should settle the matter.

The trustees called the officers, who were permitted, against the plaintiff's objection, to testify that they did not waive any of the conditions of the policy, and had no authority to make a final settlement of the loss, and said so at the time of said meeting.

Upon the trustees' answers and this evidence, Bishop, J., discharged the trustees, and the plaintiff excepted.

MERRICK, J. It is conceded by the plaintiff, that after the occurrence of the injury by fire to the insured property, no such notice as is made requisite by the provisions of the policies to render them liable for the loss was ever given to either of the

Construction. — Amount of Recovery.

corporations who are summoned as trustees; and that they are therefore entitled to be discharged, unless by the acts and proceedings of their officers their right to such notice was virtually waived. Such provisions respecting the notification of a loss were undoubtedly for the benefit of the insurers, who could, of course, if they should see fit to do so, dispense with its being given. And they may waive it in express terms, or it may be assumed as a fact if it is a result by necessary implication from their acts or the acts and conduct of their officers. *Clark v. New England Mutual Fire Insurance Co.* 6 Cush. 342; *Underhill v. Agawam Mutual Fire Ins. Co.* 6 Cush. 440.

But the difficulty with the plaintiff's case is, that there has been no waiver; and no transactions from which, in connection with the proofs by which they are surrounded, a fact of that kind can legitimately be inferred. The answers of the trustees are to be taken to be true; and both corporations in their answers expressly declare that they never waived or intended to waive the benefit secured to them by the provisions in the policies which they issued, concerning the notice to be given them by the insured in case of loss. There is some apparent, and perhaps real, conflict in the testimony of the witnesses, which has been put into the case by the parties in addition to the answers of the trustees; but, fully considered, it is certainly impossible to conclude from this testimony, contrary to the statements of the trustees as made in their answers, that they did in fact dispense with the requirement of the notice provided for. And as the requisite notice was in fact never given, and is not affirmatively shown to have been waived, it follows that no action could have been maintained against the insurers to recover the amount of the loss; and consequently that they cannot be adjudged to have had any goods, effects, or credits of the defendants in their hands when the plaintiff's writ was served upon them. *Trustees discharged.*

MISSISSIPPI MUTUAL INSURANCE CO. vs. INGRAM & LAUD.¹

(High Court of Errors and Appeals, Mississippi, October Term, 1857)

Construction. — Amount of Recovery.

Contracts of insurance, like all other contracts, must be construed according to the intention of the parties, as manifested by the words used, and according to their ordinary signification.

¹ 34 Miss. 215.

Limitation Clause. — Reinsurance.

Under a fire policy, as usually made, the assured is entitled to recover from the underwriter the whole amount of a partial loss, if it do not exceed the amount insured, although the amount insured be less than the value of the property at risk.

The underwriters contracted "to make good unto the assured, their executors, &c. all loss or damage, not exceeding in amount the sum insured, as shall happen to the property by fire." The property at risk exceeded in value the sum insured, and a partial loss occurred, exceeding also the amount insured. *Held*, that as there was no provision in the policy for an average of the loss between the assured and the underwriters, the assured was, by the terms of the contract, entitled to recover the whole amount of the loss.

J. & H. SMITH vs. EMPIRE INSURANCE CO.¹ (Supreme Court, New York, October, 1857.) *Knowledge of Agent. — Warranty.*

If an insurance agent be requested by the applicant for insurance to fill out the application, he becomes *pro hac vice* the agent of the latter, and his knowledge of the facts of the risk will not charge the insurer.

The application was made part of the policy, by a reference therein to it as forming part of it. The conditions annexed to the policy also formed part of it by express reference. One of the conditions required the plaintiffs to state in the application "the nature and amount of incumbrances, if any," on the property; and it declared that "any misstatement or concealment relative" to the same should "render the insurance void, the validity of the policy being based thereon." Another condition was that there should be no waiver or evasion of any of the printed terms and conditions of the policy. The insured stated that there was but one incumbrance upon the property. When the policy was issued there were two mortgages on the land upon which the insured property was situated. *Held*, that the statements of the application were warranties, and the policy avoided, though one of the mortgages was only a nominal lien upon the land.

The above statement, that there was but one mortgage, was inserted by an agent of the insurance company, but the act being impliedly authorized by the plaintiffs. *Held*, that it was their statement.

MCDONELL vs. THE BEACON FIRE AND LIFE ASSURANCE CO.²
(Common Pleas, Upper Canada, Michaelmas Term, 1857.) *Other Insurance.*

The not communicating at the time of the proposal for an insurance the fact that there was an insurance already effected with another company, *held*, not to be such a wrongful concealment as to sustain a plea of fraud, avoiding the policy.

EAGLE INSURANCE COMPANY vs. LAFAYETTE INSURANCE CO.³
(Supreme Court, Indiana, November Term, 1857.)

Limitation Clause. — Reinsurance.

The limitation clause *held* invalid.

In case of reinsurance, the reinsured can collect of the reinsurer before payment to the original party insured. Nor does the insolvency of the company reinsured discharge the reinsurer.

Reinsurers may make any defence that the insurer could.

THE case is stated in the opinion.

PERKINS, J. The Lafayette Insurance Company issued a pol-

¹ 25 Barb. 497.

² 7 Up. Can. C. P. 308.

³ 9 Ind. 443.

Limitation Clause. — Reinsurance.

icy of insurance to one Smith, whereby they assured him, to the amount of \$900 against loss by fire. The policy was upon his house, &c.; run for one year; and contained a stipulation that suit should be brought on the policy, to recover for any loss, in six months from the happening thereof and not afterwards.

Subsequently, and within the year, said Lafayette Company took from the Eagle Insurance Company, of Cincinnati, Ohio, a policy of insurance on the policy the former had issued to Smith, and running for its unexpired time, whereby said Eagle Company did "insure the Lafayette Insurance Company against loss or damage by fire, to the amount of \$900 on policy No. 20, running to Mathias Smith; the above risk being based upon and bounded by policy No. 20," &c. The policy continues, in the terms of ordinary policies of insurance, to its conclusion. The policies were both issued by an agent.

Smith's house, it is alleged, was destroyed by fire, and thereupon the Lafayette Insurance Company sued the Eagle Insurance Company on the policy of reinsurance issued by the latter to the former.

A question was earnestly contested below as to the right of the agent to act in the premises in taking the contract of reinsurance, &c.; but it has been passed upon by a jury; and the state of the evidence would not, we think, under the rules uniformly adhered to by this court as to setting aside verdicts, authorize us to disturb that in this case, on this point.

But the record does present embarrassing questions of law. The answer of the Eagle Company, third paragraph, assuming that contracts of insurance are contracts of indemnity, and that the assured has no right to recover where he has suffered no damage, alleges that the original policy of the appellee contains a conventional limitation, by which it is provided that no suit against the company shall be sustainable unless commenced within six months after loss; that if any suit shall be commenced after the expiration of the time thus limited, the lapse of time shall be taken as conclusive evidence against the validity of the claim; that the only suit ever commenced against the appellee, on her original policy, by Smith, had been voluntarily dismissed by him, at his own costs, after the expiration of six months next ensuing the loss; that the appellee had not paid anything to Smith, on account of the policy to him, but wholly refused to do so; that

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more than six months had elapsed, after the loss, before the suit in this case was brought; and insisting upon the conventional limitation in bar of the suit. The sixth paragraph is in the nature of a plea of *non damnificatus*.

The court below sustained demurrers to these paragraphs of the answer, and instructed the jury, upon the trial, that such defence was unavailing; and there was judgment for the plaintiff. Were these rulings of the circuit court correct?

Contracts of insurance have ever been regarded as contracts of indemnity. There does not seem to be any conflict in the authorities upon this general proposition. 2 Smith's Lead. Cas. top p. 252; *Murdock v. The Chenango, &c. Insurance Company*, 2 Comst. 210,¹ and cases there cited.

Contracts of fire and marine insurance must be contracts of indemnity, or wagering contracts, which, in this state, would be illegal. And to indemnify, means to secure one from, or compensate one for, damages or loss that may happen from a given act or event.

Upon this principle, *Godsall v. Boldero*, 9 East, 72, was decided, — a case subsequently recognized in *Bainbridge v. Nelson*, 10 Ib. 344, and *Tunno v. Edwards*, 12 Ib. 493, — and in which it was held that "a creditor may insure the life of his debtor to the extent of his debt; but such a contract is substantially a contract of indemnity against the loss of the debt; and therefore, if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy."

The principle decided in *Godsall* and *Boldero*, as applicable to contracts of fire and marine insurance, has not, so far as we are advised, been disputed in the English courts; but, as applicable to contracts of life insurance, it has been held erroneous. In *Dalby v. The India & London Life Assurance Company*, decided after much discussion and full consideration, in 1854 (28 Eng. L. & Eq. R. 312), Baron Parke, in delivering the opinion of the court, said: "Upon considering this case [*Godsall v. Boldero*], it is certain that Lord Ellenborough decided it upon the assumption that a life policy was, in its nature, a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor, existing at the time of the action brought; and his lord-

¹ *Ante*, vol. 3, p. 36.

Limitation Clause. — Reinsurance.

ship relied upon the decision of Lord Mansfield, in *Hamilton v. Mendes*, 2 Burr. 1210, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not the nature of what is termed an assurance for life; it really is what it is on the face of it — a contract to pay a certain sum in the event of death," in consideration of the payment of a previous annuity. See, also, *St. John v. The American, &c. Insurance Co.* 3 Kernan, 31.

If original contracts of fire and marine insurance are of indemnity, much more so, it seems to us, should those of reinsurance be held such; and, upon the general proposition that they are, the authorities all concur. *Hone et al v. The Mutual, &c. Co.* 1 Sandf. (N. Y.) R. 137; *The Mutual, &c. Co. v. Hone et al.* 2 Comst. 235.¹

The contract, then, being one of indemnity, it would seem that the reassured should only recover for actual loss sustained by such reassured. *Loyd et al. v. Marvin*, 7 Blackf. 464; *Schooley v. Stoops et al.* 4 Ind. R. 130; *Lewis v. Richey*, 5 Ib. 152; *Francis et al v. Porter*, 7 Ib. 213; *Tate v. Booe et al.*, May Term, 1857.² See, particularly, this latter case. But the New York courts do not carry out the doctrine to this extent. They hold that "reassurance is a contract of indemnity to the reassured, and binds the reinsurer to pay to the reassured the whole loss sustained in respect of the subject insured, to the extent for which he is reinsurer." But that "it is not necessary for the reassured to pay the loss to the first insured, before proceeding against the reinsurer. Nor is the liability of the latter affected by the insolvency of the reassured, or his inability to fulfil his own contract with the original insured." *Hone v. The Mutual, &c. Co., supra*. We have found no case, however, deciding that where the reassured is not liable upon the original policy, a recovery can be had against the reinsurer. Some *dicta* in the case last cited might seem to go that length; but they must be interpreted and limited by the question there in discussion. If it were law that the reassured could recover in such case, the contract of reassurance would not be one of indemnity, and the doctrine laid down by Judge Story, in *The New York, &c. Insurance Co. v. The Protection Insurance Co.* 1 Story's R. 458, would be incorrect. He says: "This is a case of reassurance,

¹ *Ante*, vol. 2, p. 579.² 9 Ind. 13.

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and nothing is clearer, upon principle and authority, than that, in such a case, the assurers are entitled to make the same defence, and to take the same objections which might be asserted by the original insurers in a writ upon the first policy." See, also, 3 Caines, 190. And, in determining what defences might be made by the original insurer, we look at the case as it stands at the time when the reinsurers are sued, except as to the fact of payment by the original insurers. Where they have not paid nor adjusted the losses, and the case stands between them and the original assured upon the terms of the policy and the facts connected with the loss, at the time the reinsurers are sued, we think the reinsurers should be permitted to make every defence the original insurers could then make. Especially should it be so in this case; for by the terms of the policy of reinsurance, their liabilities are to be bounded in all things by the terms of the original policy. This incorporates into the policy of reinsurance the six months' limitation clause, as between the original and reinsurers.

We are cited to the case of *King v. The State Mutual Insurance Co.* 7 Cush. 1,¹ as in point; but we do not so regard it. That was the case of a mortgagee taking a policy upon the mortgaged property; a loss before the mortgage was paid, and a recovery upon the policy. A mortgagee has an insuperable interest in the property, and may well recover for a loss or diminution of that interest while his mortgage is subsisting. It is not like a contract of reinsurance upon a policy on which the reinsured himself is not liable, and hence, has no insurable interest. See *Carpenter v. The Providence, &c. Insurance Co.* 16 Pet. 495.² This, then, brings us to the question, could the original insurers, in a suit upon the first policy, avail themselves in defence of the clause requiring suit to be brought in six months? Is that a valid provision? Mr. Justice Nelson, of the supreme court of the United States, has decided that it is; *Cray v. The Hartford, &c. Insurance Co.* 1 Blatch. 280;³ and Mr. Justice McLean, of the same court, has decided that it is not. *French et al v. Lafayette Insurance Co.* 5 McLean, 461. There are cases bearing a remote analogy. This court has decided that, in case of ordinary contracts, an agreement not to sue for a limited time is no bar to a suit within that time; 5 Blackf. 125; but that an agreement never to sue upon a then existing right of action is good

¹ *Ante*, vol. 3, p. 186.² *Ante*, vol. 2, p. 448.³ *Ib.* p. 674.

Limitation Clause. — Reinsurance.

as a release. *Harvey v. Harvey*, 3 Ind. R. 473. It has also decided that, where there is no statute authorizing a judgment without stay of execution, a provision in a contract authorizing such judgment will not be regarded in entering judgment. *Devlin v. Wood*, 2 Ind. R. 102; 4 Ib. 239. It has also decided that where parties agree that, for a breach of contract, a certain sum named in the contract shall be liquidated damages, the same will be taken by the court to be such. *Carpenter v. Lockhart*, 1 Ind. R. 434. And in *Grant v. The Lexington, &c.*, this court held that a stipulation in a policy of insurance, limiting the time within which suit should be brought, could not be set up by the company in bar of a suit brought after that time, where their own acts had contributed to the delay in bringing the suit. 5 Ind. R. 23.

It is a legal maxim, that the agreement of the parties overrules the law. Broom's Leg. Max. 539. But this maxim is qualified by another, that the agreement of parties cannot render valid that which is against public policy, is in contravention of positive law, or "is unjust and deficient in respect to any matter which the law declares to be indispensable and not circumstantial merely." Broom, *supra*. It is not easy to see that the stipulation in question is against public policy, or unjust, or in conflict with any positive requirement of law. On the contrary, it is for the interest of the insurance companies and the public, that the exact condition, the precise extent of the liabilities of these companies, should be known. That such may be the case, it is necessary that losses covered by policies shall be speedily adjusted and paid. Six months would seem to be long enough, a reasonable time, to enable the party sustaining loss to ascertain and present it to the company for payment, and to sue for it, if not paid. There is no positive law requiring him to wait six or twenty years. A party may relinquish or waive a legal provision operating for his benefit, where it is not against public policy to allow such waiver; and in these cases it would seem to be done upon a consideration. If insurance companies know they cannot be sued upon old, stale, disputed claims, after their witnesses may be beyond their reach, they can, and doubtless did in this case, insure at a lower rate. We incline to the opinion that the limitation clause is valid. It is a covenant never to sue after six months. But a majority of the court think the case falls within

Misrepresentation of Title. — Use of Premises.

the principle of *Develin v. Wood*, *supra*, and that the stipulation in question should be held void.

Such being the fact, the Lafayette Insurance Company remains liable to the insured, Smith, and the New York cases above quoted apply, and furnish the rule of decision.

PER CURIAM. The judgment is affirmed with 1 per cent. damages and costs.

BENJAMIN COLLINS v. CHARLESTOWN MUTUAL FIRE INSURANCE Co.¹

(Supreme Court, Massachusetts, November Term, 1857.)

Misrepresentation of Title. — Use of Premises.

Two partners in an application for insurance on a building, which was required to contain "a full, fair, and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk," stated that they owned the land on which it stood. In fact one of them, to whom the policy was made payable, owned it, and the other was charged on their books with half its cost. The partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his copartner, to whom the insurers, with notice of the facts, agreed that the policy should "stand good." *Held*, that the insurers were liable for a loss by a subsequent fire.

A description in an application for insurance of a building as used "for the manufacture of lead pipe," or "of lead pipe only," includes the manufacture of wooden reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe.

THOMAS, J. This is an action of contract upon a policy of insurance on a lead mill. The parties insured were Benjamin Collins and George L. Stearns, partners under the firm of Collins & Stearns. Collins, the plaintiff, is a mortgagee of the premises, to whom the policy was payable in case of loss. The making of the policy and the loss by fire within the term being admitted, the defendants rely upon two grounds of defence. First, that there was a misrepresentation in the application of the assured as to the title of the estate. Secondly, a representation and warranty as to the use to which the building was then and should be thereafter applied, and a breach of that warranty and representation.

1. The estate was conveyed by deed to George L. Stearns, one of the partners. The legal title was in him. In the application, signed by Collins & Stearns, in answer to the question, "Do you own the land upon which the buildings stand?" the answer is, "Yes."

¹ 10 Gray, 155.

Misrepresentation of Title. — Use of Premises.

The policy secures a lien upon the land and buildings. One of the provisions of by-laws is, that "the policy shall become void and of no effect, if the application shall not contain a full, fair, and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk."

So far as respects the lien, the insurance company is not affected. The property is owned by one of the parties to the note. Each partner is liable *in solido*. The lien is therefore perfect. Nor is it easy to see how it was material to the risk, whether the title to the estate was in one or both the partners.

But though the legal title to the land was in one of the partners, the equitable title was in the firm. Stearns held the estate in trust for the partnership. By the written articles of copartnership, Collins was to be charged on the books of the partnership with one half of the cost of the mill. Upon the books of the partnership, Stearns was credited with the agreed value of the mill. The estate became part of the capital of the firm. It was the property of the firm, though the legal title was in one of the partners only. Such was the state of the title when the application was made. In the statement that Stearns and Collins owned the estate, we see no misrepresentation material to the risk.

The case of *Smith v. Bowditch Mutual Fire Ins. Co.* 6 Cush. 448,¹ is quite distinct from that at bar. By the 17th article of the by-laws of that company, it was provided that any policy issued by the company should be void unless the true title of the insured should be expressed in the application for insurance; and the plaintiff had no legal title to the estate of which he represented himself the owner. He had only a bond for a deed. No lien therefore was secured. Nor was the true title of the insured expressed in the application.

In the case of *Davenport v. New England Mutual Ins. Co.* 6 Cush. 340,² in answer to the question whether the estate was incumbered, the answer was in the negative, the estate being at the time subject to heavy mortgages. The case of *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray, 431, is to the same point. It goes no further.

In *Allen v. Charlestown Mutual Fire Ins. Co.* 5 Gray, 384,³

¹ *Ante*, vol. 3, p. 146.

² *Ib.* p. 129

³ *Ante*, p. 31.

the distinction is made between the preceding cases and one in which the statement as to title was substantially correct, and where the difference, if any existed, did not impair the lien of the company or otherwise affect the risk.

But, as if to free the case before us from difficulty, in January, 1854, the partnership was dissolved. Collins transferred his interest in all the assets of the partnership to Stearns. The dissolution and conveyance were made known to the insurance company, and on the 24th of March, 1852, with full knowledge of the facts, they indorsed on the policy this agreement: "Agreed that this policy shall from this date stand good to George L. Stearns." And we think it does stand good, unless there is force in the second ground of defence, which is misrepresentation of the purpose for which the building was to be used.

2. To the question, "For what purpose occupied, and by whom?" the answer is, "By the applicants, for the manufacture of lead pipe only."

The defendants offered evidence to show that the attic of the building was used for the manufacture of reels upon which the lead pipe is coiled. But the answer, and we think satisfactory answer, made by the plaintiff, was, that the making of the reels upon the premises was a necessary and essential part of the manufacture of lead pipe. The evidence was submitted to the jury under these instructions: "That the term 'manufacture of lead pipe' would include all that was reasonably necessary and essential for carrying on the business of manufacturing lead pipe in the building insured; that if, for the proper and reasonable carrying on of the business, it was essential to manufacture reels upon the premises, by the machinery and in the manner proved, the representation that the building was used for the manufacture of lead pipe only was sufficient; that the mere fact that it was more economical or convenient to make reels upon the premises was not sufficient to authorize the insured to make such use of the premises." These instructions seem to us entirely correct.

In this view of the case, the question whether the word "only" was contained in the application becomes immaterial. It does not change the force of the words "manufacture of lead pipe," or exclude anything essential to it.

Judgment on the verdict for the plaintiff.

Fall of Buildings and subsequent Fire.

WILLIAM K. LEWIS & another vs. SPRINGFIELD FIRE AND
MARINE INSURANCE CO.¹

(Supreme Court, Massachusetts, November Term, 1857.)

Fall of Buildings and subsequent Fire.

Insurance against fire was effected on goods "contained in a granite store;" one of the walls gave way, and half of the store and the whole of the adjoining building fell; before there was time to remove the goods, fire broke out in that building. *Held*, that the insurers were liable for damage from fire, and from water used to extinguish it, to goods not displaced or injured by the fall.

ACTION of contract upon a policy of insurance for \$10,000 against fire, "on stock, steam-engine and boiler, fixtures, furniture, and safe, contained in the new granite store, No. 93 Broad Street, Boston, Massachusetts," subject to certain conditions of insurance annexed, by which "druggists and apothecaries" are enumerated among the "trades and occupations, goods, wares, and merchandise denominated extra hazardous;" and "applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured, and, in case of goods or merchandise, whether or not they are of the description denominated hazardous or extra hazardous; and a false description by the insured of a building or of its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, shall render absolutely void a policy issuing upon such description." Trial in this court, before Bigelow, J., who made the following report thereof:—

"The plaintiffs' said store, No. 93, was separated from store No. 95 by a party wall of stone and brick.

"On the 22d of August, 1854, this wall, or the foundation thereof, gave way, and the whole of store 95 and half of store 93, including the whole of the front wall of the latter store, fell and became a mass of ruins; while the other half of the plaintiffs' store was left standing, supported by a row of iron pillars, which prior to the accident ran through the middle of the plaintiffs' store for the purpose of supporting the floors thereof. Half the roof remained, and covered that portion of the store which remained standing after the accident.

"At the date of the policy, and at the time of the accident, the

¹ 10 Gray, 159.

Fall of Buildings and subsequent Fire.

plaintiffs occupied the store as tenants, and had stock therein to the amount of seventy thousand dollars and upwards.

"Shortly after the accident above mentioned, with an interval stated by the witnesses to have been between fifteen and forty minutes, a fire (supposed to have been occasioned by the comingling of chemicals) broke out amongst the ruins of the adjoining store aforesaid (which had been used as a drug store), which fire communicated with and burned portions of that part of the plaintiffs' store which remained standing, and also partially burned and damaged some of the goods therein.

"For the purpose of extinguishing said fire, large quantities of water were thrown by the fire department of the city upon the ruins of store No. 95, and into and upon that part of the plaintiffs' store which remained standing, and upon the goods remaining therein, whereby the said stock of goods remaining in that portion of said store was damaged.

"No portion of the goods for which the plaintiffs claimed damage under the policy fell; nor were they injured otherwise than by fire or water or both.

"The jury, by order of the presiding judge, returned a verdict for the plaintiffs, which is to be set aside if in the opinion of the full court it cannot be sustained."

MERRICK, J. In support of their objection to the direction which was given to the jury, and to the right of the plaintiffs to recover a verdict for any sum of money whatever upon the facts set forth in the report, the defendants assert and attempt to maintain, first, that in obtaining the insurance upon their stock, the plaintiffs warranted that it then was, and thereafter should continue to be, contained in their store described in the policy; and secondly, that the stock which was injured was not contained therein at the time of the occurrence of the fire.

It is unnecessary to discuss or even to notice the first of these propositions, because there appears to be an entire failure to substantiate the second, without which it is not pretended that the former can afford any defence to the plaintiffs' action. All the plaintiffs' stock was in their store, just as the defendants contend they warranted that it should be, when the partition between their own and the adjoining store began to give way. That was the commencement of one common and general disaster. The fire, and the falling of the walls and of other parts of the two stores,

Insurable Interest. — Certificate of Magistrate.

which immediately followed, were not separate and independent events, but were merely parts and successive circumstances in the progress of a single calamity. Though the cause and origin of the fire may perhaps be satisfactorily conjectured, the precise moment when it was kindled is not known; but the interval which elapsed before it was discovered, after the crash of the buildings had been heard, was certainly very brief. The witnesses who testified of it varied in their estimate of its duration from fifteen to forty minutes. This slight difference of opinion on a mere matter of judgment of the lapse of time is really of no importance. The material fact is, that the flames broke out and burned the plaintiffs' goods before there could have been any possible interposition for their safety, and must thus be considered as having occurred substantially at the same time with the other incidents of the disaster. They were all blended together in one catastrophe, and constituted a single event, upon a due consideration of which the rights of all parties are to be determined.

As it is thus shown that the defendants cannot maintain one of the two propositions, both of which are indispensable to sustain their objection, the direction to the jury to return a verdict for the plaintiffs was correct, and judgment must accordingly be entered upon it. *Judgment on the verdict for the plaintiffs.*

THE WESTERN ASSURANCE COMPANY vs. ATWELL.¹ (Queen's Bench, Lower Canada, December, 1857.) *Double Insurance.*

The condition usually indorsed on "Policies of Insurance respecting double insurance" is binding in law, and its performance will not be held to be waived by the company, if their agent, on being notified of such double insurance *after the fire*, make no specific objection to the claim of the assured on that ground.

ÆTNA INSURANCE CO. vs. R. N. MIERS.²

(Supreme Court, Tennessee, December Term, 1857.)

Insurable Interest. — Certificate of Magistrate.

The interest one acquires in a house and lot purchased at execution sale, though no money be paid, and no deed received, is insurable. It is necessary however, to render a policy valid, that such interest should have been fully disclosed to the insurer before the policy issued.

Equities of redemption in real estate, or the right to redeem property sold under execution, or the interest of the mortgagee as well as the mortgagor, are insurable interests.

¹ 2 L. Can. Jur. 181.

² 5 Sneed, 139.

Non-disclosure. — Acts of Agent. — Overestimate. — Evidence.

When a policy issues for the insurance of property in which the insured has no interest, such policy is illegal and void.

The stipulation in the conditions of a policy, that affidavit of the loss shall be made before the nearest magistrate, is merely directory, and cannot be construed as a condition precedent to the liability of the insurer.

CARUTHERS, J. (As to the last point in the head note.) The affidavits and certificate required by the terms of the policy to be made before and by the *nearest* magistrate were not intended as a condition precedent to the liability of the insurers, and were regular and sufficient. Justice Boddie was the nearest, except two, who were creditors of the insured, and was therefore the proper officer.

CUMBERLAND VALLEY MUTUAL PROTECTION COMPANY *vs.*
SCHELL.¹ (Supreme Court, Pennsylvania, Harrisburg, 1857.) *Non-disclosure. — Acts of Agent. — Overestimate. — Evidence.*

Where a risk is taken and estimated on the faith of representations made by the insured, the law requires that this representation shall truly and completely express his knowledge of the dangers to which the property is exposed, and the contract will be void if they do not.

Where, however, the insurers do not depend upon the representations of the insured, but upon their own knowledge of the character of the risk, the representations of the insured are immaterial; though a withholding of information, tending to increase the risk, would be incompatible with good faith, and would avoid the contract.

If an agent of the insurer goes upon the premises and examines and describes the property, it will not be presumed that an application taken by such agent, which merely individuates the property insured, was intended as a representation of the hazards to which the premises were exposed.

A change of the use of the property after the contract, which increases the hazard, suspends the insurance during its continuance.

The relation of a co-corporator in a mutual insurance company is only consummated by the fact of insurance; in the act the insured is a stranger.

This, therefore, does not convert the previous acts of examination and description by the agent of the company into his acts, and change it into a representation by him.

An overestimate of the value of the property by the agent will not avoid the policy unless the insured has taken some fraudulent part in it.

The by-law of a company which prohibits an insurance that exceeds two thirds of the estimated value of the property insured is not intended as a condition of the contract, but as a direction of the discretion of the officers of the company in making the insurance.

Where the value of the buildings, at the time of the fire, is put in issue by the pleadings, evidence tending to show such value is relevant and admissible.

In estimating such value, the rental of the buildings consumed is not so remotely circumstantial as to be excluded on that account.

¹ 29 Penn. St. 31.

Misrepresentation. — Watchman.

JAMES A. BROWN & wife vs. SAVANNAH MUTUAL INSURANCE Co.¹ (Supreme Court, Georgia, January Term, 1858.) *Waiver. — Limitation Clause.*

A valid legal objection to the payment of a loss on a policy of insurance is not a waiver of all other objections, if the plaintiff go into equity to avoid the effect of that objection at law.

A shorter period than the statutable period for the institution of suits, by agreement of the parties in their contract, violates no principle of public policy, provided the period fixed be not so unreasonable as to raise a presumption of imposition or undue advantage in some way.

HALTON vs. THE PROVINCIAL INSURANCE COMPANY.² (Common Pleas, Upper Canada, Hilary Term, 1858.) *Conditions.*

The sixty days allowed by the condition indorsed on the policy for the payment of the money does not begin to run till after the insured has given in his proofs of loss, and upon an action brought before the expiration of the sixty days, the plaintiff was nonsuited.

MILLIGAN vs. EQUITABLE INSURANCE Co.³ (Queen's Bench, Upper Canada, Hilary Term, 1858.) *Insurable Interest. — Contract of Purchase.*

Where the plaintiff had contracted to purchase the property insured, and had failed in making his payments punctually, but was proceeding in equity to compel performance by the vendor: *held*, that he had an insurable interest.

LICA PARKER & another vs. BRIDGEPORT INSURANCE Co.⁴ (Supreme Court, Massachusetts, March Term, 1858.)

Misrepresentation. — Watchman.

In a policy of insurance upon a saw-mill, the assured covenanted "that the representation given in the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void." The applicant, to a question "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered, "A good watch kept; men usually at work. Watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?" In fact, no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to, and habitually did, examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises. *Held*, that the term "good watch" must be interpreted to mean "suitable" or "proper

¹ 24 Ga. 97.

² 7 Up. Can. C. P. 555.

³ 16 Up. Can. Q. B. 314.

⁴ 10 Gray, 302.

Misrepresentation. — Watchman.

watch ;" and that it was for the jury to decide whether the watch kept was a suitable and proper one, and whether the risk was affected by the watch actually kept, as compared with the one stipulated for.

ACTION OF CONTRACT on a policy of insurance upon machinery and stock in a saw-mill at Winchester, in which the insured covenanted "that the representation given in the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to them and material to the risk; and that if any material fact or circumstances shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void."

The application contained printed interrogatories, and answers written opposite them, which stated that the mill was driven by water power only, and among which were the following: —

"2. What kind of goods are made, and of what material? Are wood-shavings made on the premises? and, if so, are they cleared out of the building every night?" "Mahogany sawing and knobs turned. Very few shavings made. Cleared out every night."

"16. Is a watch kept upon the premises during the night? Is there a good watch-clock? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning, till he returns to his charge in the evening?" "A good watch kept. Men usually at work. Watchmen work at the saws." "No."

At the trial in the superior court of Suffolk at November term, 1856, it was in evidence that "there was no watch ever kept in the mill on Saturday night after twelve o'clock, or on Sunday night at all, after the date of the application to the time of the fire, other than the workmen sleeping there, who worked at the saws, and who were instructed to examine, and were in the habit of examining the mill with reference to fires before going to bed; that the fire by which the property insured was destroyed occurred on Sunday evening about ten o'clock, and that when the fire occurred neither of the persons who usually slept in the building was upon the premises, but they were in a dwelling-house near by."

Abbott, J., ruled "that it was the duty of the plaintiffs to have a person in the mill, whose employment it was to keep a good

watch in the building during the whole of Saturday and Sunday nights, although in addition to the duty of watching he might be employed about other work; and the keeping such workmen to sleep there, though with a view to greater security than would exist if there was no one there, was not a good watch or substantial performance of said duty; that a failure to substantially perform said duty would bar a recovery; and that evidence of the usage in other like mills not to keep such a watch on Sunday nights and on Saturday nights after twelve o'clock was not admissible to affect the case in this respect; and also ruled "*pro forma*, in order to carry up the point, that it was the duty of the plaintiffs to keep some person upon the premises during the whole of the daytime of Sunday, and that a customary absence of all persons during the hours of divine service would be a breach of duty which would bar a recovery." A verdict was taken for the defendants, and the plaintiffs alleged exceptions.

SHAW, C. J. Although the condition or defeasance upon which the defendants rely is put into the form of an express stipulation on the part of the assured, inserted in the policy, and declaring that, in case of a misrepresentation in a matter known to the assured and material to the risk, it shall be void; this is little, if anything more than the law itself would declare, in case of such false representation proved.

The alleged false representation is contained in the answer to the sixteenth question in the application. It is difficult to determine what is meant by the first part of that answer. One inquiry is not answered at all — that respecting the watch-clock. The inquiry was, "Is a watch kept upon the premises during the night." The answer certainly fell short of answering affirmatively to the whole question, that is, that a watchman is kept there during the whole night, or that any watchman is engaged distinct from workmen. There being nothing but the term "good" applied, "a good watch," our opinion is, that it is equivalent to "suitable," "proper," adapted to the exigency of the case. The inquiry is not as to watchman, or watchmen; the more generic term, "watch," embracing the various modes of watching such a factory. It was a factory the machinery of which was driven by water; no steam was used; it was not a manufactory of metals, or one that required the use of fire.

Upon an examination of the bill of exceptions, it appears to us

that there were several points ruled positively as matter of law, which should have been left to the jury; and this on several grounds.

In the first place, if there was not an absolute stipulation that a watch should be kept during the whole of every night in the week, such a watch as would be necessary and proper to the safety of such an establishment against fire, then it was a question of fact whether the watch actually kept was or not a good and suitable watch. *Crocker v. People's Mutual Fire Ins. Co.* 8 Cush. 79.¹

If there is a real difference between the requirement of a watch, immediately after a working day, and Sunday, which is a day of rest, then a watch might be deemed good and adequate on Sunday night, which might not be after a working day. The causes of danger of fire in a factory, we suppose, are lamps and stoves, after work is done; friction arising from the great velocity and irregular action of working machinery; spontaneous combustion; incendiaries; and lightning. The last, of course, no watch would affect; the three first, perhaps the greatest, would be likely to disclose themselves within a few hours after the close of work, and therefore would seem to exist in a less degree on Sunday night. If there was ground to except Saturday night, when the workmen, charged as workmen, examined the premises after the close of business, having an interest in the safety of a building in which they slept; or if there was ground to except Sunday night, after a day in which no work had been done; then it was incorrect to charge the jury that it was the duty of the assured to have a person to keep a good watch in the building during the whole of Saturday and Sunday nights, otherwise they could not recover.

But suppose the sixteenth question and answer, by their proper construction, could be held to be a representation that the plaintiffs had been accustomed to keep, and would in future keep, a watch on the premises every night during the week, including Sunday and Saturday, still the stipulation that this was a just and true exposition is not absolute, but only *sub modo*; the contract is, so far as they are known to the assured, and are material to risk. The question therefore is, not only whether the assured was substantially to comply with his stipulation that the representation is true and just, but whether such compliance was ma-

¹ *Ante*, vol. 3, p. 234.

Use of Camphene. — Printing Establishment.

terial to the risk. This is a question of fact, to be decided by the evidence.

The insurer may prescribe any conditions to his undertaking that he pleases, and if he makes insurance on condition that a constant watch shall be kept on the premises, otherwise the policy shall cease and be void, then if the assured fails to comply with the conditions, his policy is to cease, and no question can be made whether compliance affected the risk in any way. But when such condition is qualified by the limitation that it is a failure dependent on the question whether it is material to the risk, it opens that question in each particular case.

Exceptions sustained.

BOWMAN, plaintiff in error, *vs.* **PACIFIC INSURANCE CO.**¹ (Supreme Court, Missouri, March Term, 1858.) *Construction of Contradictory Clauses.*

In a policy it was provided that certain articles named in the memorandum of special rates should not be kept or stored in the building insured. It was also conditioned that no greater amount of gunpowder than twenty-five pounds should be placed in the building; and gunpowder was one of the articles mentioned in the said memorandum. *Held*, that the second clause above mentioned was to be construed as a modification of the prohibition of gunpowder.

HARPER et al. *vs.* **ALBANY MUTUAL INSURANCE CO.**¹

(Court of Appeals, New York, March, 1858.)

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The written portion of a policy insured the plaintiffs "on their printing and book materials, stock, paper, and stereotype plates, and printed books contained in certain buildings . . . privileged for a printing-office, bindery, and book store." Camphene "on sale" was included among the printed conditions in the class of extra hazardous articles, for which special rates were to be made. After this followed the clause: "Camphene, spirit gas, or burning fluid cannot be used in the building where insurance is effected, unless permission for such use be indorsed in writing on the policy, and is then to be charged an extra premium." Camphene was in ordinary use among printers for the purpose of their business, and the plaintiffs used it for the ordinary purposes of their printing establishment. The fire was caused by an accident in such use. *Held*, that defendants were liable.

THE case appears *supra*.

PRATT, J. The judgment of the supreme court, I think, should be affirmed.

First. The exclusion of the use of camphene in the building where insurance is effected has reference to its use in lighting the premises. This is evident, I think, from the connection in which it is found with other articles used alone for that purpose. I

¹ 27 Mo. 152.

¹ 17 N. Y. 194.

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know of no other use to which spirit gas and burning fluid are applicable except for the purpose of lighting buildings. And that is the ordinary and more general use to which camphene itself is applied. The three articles for lighting buildings being thus placed together in the prohibition, in connection with the consideration that such use is extremely hazardous, raises a strong presumption that its use for lighting alone was designed to be prohibited in this clause.

But, taken in connection with the other provisions of the policy, the presumption becomes conclusive. In the class of special rates we find enumerated camphene on sale, without any such special prohibition; and in the same class are found printers of books and job printers, the very articles which the policy by its terms covers. Its use for cleaning rollers is clearly no more hazardous than keeping it for sale. I am satisfied, therefore, that it was not the mere presence of the article which was designed to be prohibited by the special clause in the policy, but its common though hazardous use for lighting buildings.

Second. But if that clause should be deemed to include any and every use of camphene, it would not avoid the policy. The insurance in this case is upon the stock in trade used in the business of printers of books and bookbinders, and covers all such articles as are necessarily and ordinarily used in such business. The term "stock in trade" in a specified business, when used as matter of description in a policy of insurance, "includes, besides materials, everything necessary for carrying on that business." 1 Phil. on Ins. § 489. They are just as clearly, therefore, embraced in the policy as if each article thus necessarily used was enumerated at length. 2 Hall, 589; *Wall v. Howard Ins. Co.* 14 Barb. 383, affirmed in this court December, 1854. And the underwriters must be deemed to have been acquainted with the business, and with the materials ordinarily and necessarily used by the trade in prosecuting it. In issuing the policy they must be deemed to have intended to include all such materials in the risk. In construing the policy, therefore, it is to be treated as if the article of camphene to the use of which it was in fact applied, had been enumerated with the other articles covered by the policy. Thus considered, the rulings at the circuit court were clearly right.

A policy of insurance, like any other contract; should be construed so as to give it effect rather than to make it void. The

company have received a premium adequate, it is presumed, to the risk which they have taken, and hence nothing but the most stern legal necessity should constrain the court to give it a construction which would nullify it, and render it a mere deception instead of the protection which the parties to it designed.

It is a well settled point that the written part of a policy shall always prevail over the printed part, in cases of repugnancy. 2 Hall, 622. The printed forms are very general in their terms. The prohibitions inserted therein are more particularly applicable to the ordinary and more common policies of insurance upon non-hazardous property, for the purpose of protecting the insurers against any increased hazard in consequence of a change of business, or the use of any material more hazardous than that insured against. In much the greater portion of insurances there would be no repugnancy between the written and printed part of the policy, and effect, in such cases, should undoubtedly be given to every part of the instrument. Still, the substance of the contract is in the written part of the policy; and when the insurance is upon hazardous or extra hazardous goods or trades, or upon those specified in the memorandum of special rates, these printed portions are not applicable, or at most, only in a limited degree. Even in such case some effect may be given to these printed prohibitions. They would be held probably to prohibit a change of business from the one designated to another not designated, although the latter should be no more hazardous. In such cases they would not be entirely useless.

But when the insurance is directly upon the stock in trade, as for example, in the business of manufacturing and sale of camphene, to hold that a general printed prohibition (contained in every policy of insurance) against keeping or using it, unless permission be specially given and indorsed upon the policy, would have the effect to nullify its direct and positive stipulations, would be preposterous. Indeed, presented in this form, no one would contend for such a proposition. And still that is substantially the point presented in this case. For if I am right in the proposition that if the article was necessarily and ordinarily used in the business it is included in the term "stock" used in the policy, it is as plainly within the risks assumed by the defendants as if written in at length. Upon the whole, I think the rulings at the circuit court were correct and the judgment must be affirmed.

All the judges concurring,

Judgment affirmed.

Use of Camphene. — Printing Establishment.

See *Lamatt v. The Hudson River Fire Insurance Co.* 17 N. Y. 199 (March, 1858), where evidence of a verbal agreement for the use of camphene for lighting, made at the time the policy was executed, and that a portion of the premium was paid for such use, was held inadmissible.

DENIO, J. The plaintiff, against the defendant's objection to its competency, gave evidence tending to show that there was an agreement between the plaintiff and the defendant's agent, contemporaneous with the execution of the policy, that the plaintiff might use camphene as a light in the store containing the injured goods, and that a portion of the premium exacted and paid was for the privilege of such use of camphene.

I am unable to take this case out of the rule which excludes parol evidence to vary the terms of a contract in writing. If the use of camphene had simply been prohibited by the policy, the plaintiff would not have been permitted to show that the prohibition had been waived at the time of the execution of the instrument. The case is stronger in reason, though perhaps not in law, where there is found in the written contract a statement that the evidence of an agreement for the use of camphene shall be in writing. The plaintiff sought to guard against the effect of an alleged verbal agreement by stipulating, in effect, that it should be of no avail. A stronger case for the application of the rule could scarcely be stated.

It is argued that the evidence of the permission to use camphene is, in fact, indorsed. There is an entry on the back of the policy as follows: "Amount insured, \$2,000. Premium, \$25." This amount of premium, it is said, and I believe correctly, exceeds the regular premium upon such risks as this appears to be, by sufficient to cover the price of the use of camphene. But it is not stated in the entry that the increased sum was paid for the privilege of using camphene. It may just as probably, so far as the entry is concerned, have been for some

extra hazard referred to in the list of special rates. To protect the assured the indorsement must state that the amount of premium noted is for the privilege of using camphene, or it must in some manner appear in writing that such privilege had been secured to him.

I am of opinion that the judgment [which was for the plaintiff] should be reversed, and that there should be a new trial.

All the judges concurring,
Judgment reversed and new trial ordered.

In *Bryant v. The Poughkeepsie Mutual Insurance Co.* 17 N. Y. 200 (March, 1858), PRATT, J., delivered the opinion as follows: The policy in this case was upon the stock in trade of the plaintiff as a manufacturer of brass clock works. The provisions of the policy were substantially the same as those in the case of *Harper v. The Mutual Insurance Company of the City and County of Albany*, *ante*. "Saltpetre, camphene, burning fluid, spirit gas, and all other combustible and explosive fluids and materials are expressly prohibited from being deposited, stored, used, or kept in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent in writing on the policy, otherwise the policy is to be null and void."

The proof showed that turpentine was used for cleaning the works; that alcohol was used in making a mixture called lacker, which was also used in the business, and that saltpetre was used in small quantities in making a dipping acid. Evidence was given to show that these materials were necessary and ordinarily used in the business.

The defendant took exceptions to the admission of this testimony, insisting that saltpetre and spirits of turpentine were prohibited from being used by the terms of the policy, whether necessary or not, and that is the point now presented to the court. The case does not show which part of the policy was printed, if any, nor which written; but we have the right to assume that the policy was filled up from a printed blank in the usual form.

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Assuming that, the case presents precisely the same point which is discussed in the case of *Harpers v. The Mutual Insurance Company of the City and County of Albany*, *supra*, in the second point in the opinion in the case.

It is therefore unnecessary to repeat, but I refer to that case for the reasons why the judgment in this case should be affirmed.

All the judges concurring,

Judgment affirmed.

In *Harper et al. v. New York City Insurance Co.* 22 N. Y. 441, the following opinion was delivered: —

COMSTOCK, Ch. J. The jury found, in answer to interrogatories specially submitted to them, that the use of camphene, in the manner proved, was according to a general and established usage in the printing and book business, as carried on by the plaintiffs, and that such use was necessary in that business. In the written part of the policy the subject of insurance is described as the plaintiffs' printing and book materials, stock, &c., "privileged for a printing-office, bindery," &c. The language is identical with that contained in the policy which was before us in the case of *Harper v. The Albany Insurance Company*, 17 N. Y. 194. We there held, for reasons which need not be repeated, that the insurers were liable for a loss occasioned by the necessary and customary use of camphene in the plaintiffs' business, although the use of that article was prohibited in general terms in the printed conditions annexed to and forming a part of the contract. In that case, the printed form of the policy, if construed without reference to the subject of insurance, as described in the written part, proscribed the use or presence of camphene for any purpose. In this case, the printed condition declares in substance that if the article is used and a loss is occasioned thereby, the insurer will not be liable. There is not other distinction between the two cases.

And this distinction is not one of principle. In the case cited, we found no irreconcilable repugnancy between the

written and printed clauses of the contract. If such a repugnancy had been discovered, then, as the court said, the printed form must yield to the more careful and deliberate written language of the parties in describing the subject of insurance at the very moment when the policy was issued. But it was considered that each clause might take effect. By insuring the plaintiffs' stock with the privilege of a printing-office and a bookbindery, the use of such materials, including camphene, as were necessary in that business was allowed. Otherwise, the contract was a mere delusion. But the restraining clause might, nevertheless, have its full effect upon the use of camphene for the purposes of light, and for all purposes beyond its necessary connection with the stock and business insured. So, in this case, camphene must be considered as a part of the stock insured. Its continued presence and use were allowed, because the business which required its use was expressly privileged. The printed condition, exempting the underwriters from loss when occasioned by this article, should, therefore, be construed as referring to uses not within the privilege thus granted. Otherwise, the two parts of the contract are repugnant to each other, and the printed form must yield to the deliberate written expression. An insurance upon the plaintiffs' stock and business, to be of no effect if a loss should be occasioned by the combustion of an article constituting a part of that stock, and necessarily used in the business, would, I think, be an anomalous undertaking. Undoubtedly, such a contract might be made. A policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while, at the same time, it might exempt the insurer from loss if occasioned by the presence or use of the article. But I think it would need very great precision of language to express such an intention. Where camphene, or any hazardous fluid, is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be

Verbal Contract.

given to the policy accordingly, unless a different intention is very plainly declared. And such an intention, instead of being hid away in printed forms, remote from the principal contract, ought to be found in the deliberate expressions which are made use of at the time when the contract is entered into. Without doubt, all the printed conditions and specifications annexed to a policy are, or at least may be, a part of it. But they relate to insurance in general, as practised by the underwriter; and upon, or within those forms, the parties to each policy actually issued write their own particular intention. The plain meaning of the written

part should, therefore, prevail, and other clauses must yield, if repugnant, or they must be construed so as to avoid a conflict of intention. In this case, I think, the perils of keeping and using camphene were insured against, so far as the keeping or use of it was permitted at all, and that the clause which exempts the insurer from liability should be understood as applying to the presence of the article under other conditions.

The judgment should be affirmed.

Davies, Bacon, Wright, and Welles, JJ., concurred. Selden, Denio, and Clerke, JJ., dissented.

Judgment affirmed.

BEEMER vs. THE ANCHOR INSURANCE COMPANY.¹ (Queen's Bench, Upper Canada, Easter Term, 1858.) *Action. — Assignee.*

An assignee of a policy of insurance cannot sue on it in his own name, although the company agree thereby to indemnify the assured and his assignees.

See *Exchange Bank v. Rice*, 107 Mass. 37.

JONES vs. PROVINCIAL INSURANCE CO.²
(Queen's Bench, Upper Canada, Easter Term, 1858.)

Verbal Contract.

The declaration stated that defendants, in consideration of £28 paid to them as the premium of insurance of £1,500 on certain property described in the plaintiff's application, promised to insure him against loss by fire to the amount of £1,500 until notified to the contrary, subject to the conditions of the policy, — that is, the policy usually issued by defendants in like cases; that the property was destroyed by fire, and although the plaintiff had done all things necessary on his part, yet defendants had not paid him the sum insured. *Held* bad, the action for non-payment of the money not being maintainable without a policy under defendants' corporate seal.

DEMURRER to a declaration to the above effect.

ROBINSON, C. J., delivered the judgment of the court. It was stated in the argument that this is not the case of a renewal insurance for which a policy had before issued, but the application was for an original insurance, and the premium being paid, no policy had yet issued.

We are not under the impression that this would make any substantial difference, though the plaintiff may appear to be under greater difficulty in sustaining an action like the present,

¹ 16 Up. Can. Q. B. 485.

² 16 Up. Can. Q. B. 477.

Waiver of Preliminary Proof of Loss.

when no policy had ever been granted upon the risk, than where there had been one upon the same risk which had expired and the premium had been paid for renewal.

No authority has been cited that can sustain this action; and we have no doubt that we cannot support it. If no policy has issued, but the plaintiff can prove an agreement to insure, in which the terms have been so fully settled by the parties that nothing remains to be done but to deliver the policy, then the assured may have a remedy at law in an action for not delivering the policy, or he may be relieved in equity. The subject is best discussed in Angell's Treatise on Fire and Life Insurance, in his third chapter.

The plaintiff in this case has declared as if the property was in effect insured by reason of the payment of the premium, and of defendants' parol promise to insure, for he states as the breach, not that the defendants did not execute a policy, but that they did not pay the loss.

It seems that the plaintiff's best remedy would be in equity under the circumstances of this case; but we are persuaded that no authority can be shown for sustaining an action in this form against an incorporated company, for it assumes that the company can actually bind themselves for insurance made by parol.

Judgment for defendants on demurrer.

As to verbal contracts to insure, see the following cases: *Kennebec Co. v. Augusta Ins. Co.*, ante; *Rockwell v. Hartford Ins. Co.*, post; *Spitzer v. St. Mark's Ins. Co.*, post; *Belleville Ins. Co. v. Van Winkle*, post; *First Baptist Church v. Brooklyn Ins. Co.*, post; *Benjamin v. Saratoga Ins. Co.*, post; *Montreal Ins. Co. v. McGillevray*, post; *Penley v. Beacon Ins. Co.*, post; *Kelly v. Commonwealth Ins. Co.*, post; *Davenport v. Peoria Ins. Co.*, post; *Audubon v. Excelsior Ins. Co.*, post; *Sandborn v. Firemen's Ins. Co.*, post; *Tyler v. New Amsterdam Ins. Co.*, post, vol. 5; *Baxter v. Massachusetts Ins. Co.*, post, vol. 5; *Walker v. Metropolitan Ins. Co.*, post, vol. 5; *Patterson v. Royal Ins. Co.*, post, vol. 5; *Eureka Ins. Co. v. Robinson*, post, vol. 5; *Security Ins. Co. v. Kentucky Ins. Co.*, post, vol. 5.

FIREMEN'S INSURANCE CO. vs. CRANDALL.¹ (Supreme Court, Alabama, June Term, 1858.) *Waiver of Preliminary Proof of Loss.*

If the insurers, in case of a loss covered by the policy, intend to contest their liability on account of defects in the preliminary proof, it is their duty to put their refusal to pay on that ground, or to inform the assured that they consider such proof defective; and if they fail to do so, their silence is an implied waiver of such defects. (STONE, J., dissenting, held that, under the proof in this case, the court was not authorized to assume, as matter of law, that the answer of the insurers was a refusal to pay in any event.)

¹ 33 Ala. 9.

Action. — Parties.

GROSVENOR vs. ATLANTIC FIRE INSURANCE CO.¹

(Court of Appeals, New York, June Term, 1858.)

Action. — Parties.

An action cannot be maintained by a mortgagee, to whom a policy is made payable, if he be not named as the party insured, upon a breach of the terms of the policy by the party so named.

THE case is stated in the opinion.

HARRIS, J. The contract of insurance is a contract of indemnity. To sustain an action upon such a contract, it must appear that the party insured has sustained a loss. This involves the necessity of an insurable interest at the time of the alleged loss. Without such interest, the party insured cannot be damnified.

In this case, the contract was between the defendants and McCarty. The agreement was to insure Eugene W. McCarty against loss or damage by fire, to the amount of \$7,000, on his three story brick dwelling-house. But after the contract was made, and before the alleged loss, McCarty had sold and conveyed the property insured. At the time of the fire he had no insurable interest; of course, he has no claim for indemnity. No action, therefore, could be maintained upon the policy by McCarty.

But at the time the insurance was effected, the plaintiff in this action, Grosvenor, was the holder of a mortgage upon the premises insured. As such mortgagee, he, too, had an insurable interest. The extent of that interest was the amount of his debt. To that extent he might have contracted with the defendants to indemnify him against loss by fire. The payment of his debt would as completely terminate the contract to insure as would the alienation of the property, when the contract is made with the owner.

The important inquiry in this case is, to which of these classes does the contract in question belong? The action is brought by the plaintiff as mortgagee. The contract was made with McCarty, the mortgagor. But the policy provides that in case of loss, such loss should be payable to the plaintiff. What is the legal effect of this provision? Without it the plaintiff could have had no claim against the defendants for indemnity. Is this provision to be regarded as an appointment of the plaintiff to receive

¹ 17 N. Y. 391.

Action. — Parties.

any money which might become due from the insurers by reason of any loss sustained by the mortgagor, or has it the effect to render the policy, which would otherwise be a contract to indemnify the mortgagor against a loss, a contract to indemnify the mortgagee? A determination of this question will also determine the rights of the parties to this action.

Were it not for one or two decisions in this state bearing upon the question, I should have little difficulty in pronouncing in favor of the former of these propositions. It seems to me to be very clear that it was the intention of all the parties that the interest of the mortgagor, and not that of the mortgagee, should be insured. It is stated in the policy that the property insured is the property of McCarty, and that he is the person insured. McCarty paid the premium. He made the contract. His interest as owner, and not that of the plaintiff as mortgagee, was the subject of the insurance. The plaintiff was merely the appointee of the party insured to receive the money which might become due him from the insurers upon the contract. The provision in the policy in this respect had no more effect upon the contract itself than it would if it had been provided that the loss for which the insurers should become liable should be deposited in a specified bank to the credit of the party insured.

Suppose that the plaintiff, although described in the policy as a mortgagee, had, in fact, held no mortgage, could it be pretended that the defendants might have avoided the policy on the ground that the plaintiff had no insurable interest? Or, suppose again, that after the contract had been made, the mortgage had been paid; could it be claimed that the contract to insure had also ceased? I presume none will deny that, in either case, the contract would have continued in force for the benefit of the owner of the property insured. If so, it must have been because the interest of the mortgagor, and not that of the mortgagee, was the thing insured. I agree with the court below, that "there is nothing in the language of the policy on which the court can adjudge that in legal effect it is a contract insuring the interest of the mortgagee as such, except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest, shall be payable to the mortgagee. That provision merely designates a person to whom such loss is to be paid, and shows that he is a person who may have an interest in its being so paid."

The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable, before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. *Macomber v. The Cambridge Mutual Fire Ins. Co.* 8 Cush. 133.¹ The insurance being upon the interest of the mortgagor, and he having parted with that interest before the fire, no loss was sustained by him, and, of course, none was recoverable by his assignee or appointee. The right of such a party being wholly derivative, cannot exceed the right of the party under whom he claims. *Carpenter v. The Providence Washington Ins. Co.* 16 Peters, 495;² *Foster v. The Equitable Fire Ins. Co.* 2 Gray, 216.

I agree with the learned judges who delivered opinions upon the decision of this case in the court below, that there is no just ground for discrimination between this case and that of an assignment of the policy to a mortgagee to be held by him as collateral security for his debt, with the consent of the insurer. In either case the insurance is upon the interest of the mortgagor. The terms and conditions upon which indemnity may be claimed are agreed upon, and then the original parties further agree that when, by the terms and conditions of the contract, the insurers shall become liable by reason of a loss sustained by the party insured, the money shall be paid, not to the party who has sustained the loss, but to his appointee or assignee for his benefit. Such an appointment or assignment ought not to be construed so as to vary, in any respect, the liabilities of the insurers upon their original contract. It is certainly true, as was said by Mr. Justice Woodruff, that "when applied to other agreements for the payment of money, an assignment does no more than direct to whom it shall be paid when it shall become due."

The case of *The Traders' Ins. Co. v. Robert*, 9 Wend. 404,³ was, in my judgment, erroneously decided, and unless by subse-

¹ *Ante*, vol. 3, p. 244.² *Ante*, vol. 2, p. 448.³ *Ante*, vol. 1, p. 600.

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quent recognition or acquiescence, it has become so securely imbedded in the law of this state that it may not be disturbed, it ought not to be followed. It was a condition of the policy in that case, that it should cease if the assured should effect a further insurance upon the property, and should omit to give notice of such further insurance within a reasonable time. The policy in question was assigned to a mortgagee with the assent of the insurers. After this assignment, the party insured effected a further insurance with another company and neglected to give the requisite notice. It was held that the action being brought by the assignee of the policy, though in the name of his assignor, no act of the latter, after the assignment, could be allowed to prejudice the rights of the former. The argument by which this result was reached seems to me to have been singularly illogical and inconclusive. Indeed, it depends entirely upon the misapplication of a very familiar principle: "Had the nominal plaintiff executed a release to the insurance company," say the court, "it would have no effect upon the rights of the assignee; and if he could not directly discharge the right of action which he had assigned, surely he cannot do it indirectly. The fact, therefore, of his having effected a subsequent insurance upon the same premises, can have no influence upon the rights of the real plaintiff in this suit." It is quite obvious, I think, that the learned judge who delivered the opinion entirely failed to discriminate between acts done for the purpose of discharging the liability of the insurers upon their contract, and acts which, by the terms of the contract, were necessary in order to continue such liability. All will agree in the soundness of the premises upon which the argument is founded. It is true that the assignor of a right in action cannot indirectly, any more than he can directly, do anything which will discharge the liability of the other contracting party to his assignee. But it is equally true, that where such liability is, by the terms of the contract, made to depend upon the performance of an act by the assignor, an assignment of the contract will not operate to dispense with the performance of the act as a condition of liability. It had been stipulated between the contracting parties, that if the assured should effect a further insurance, and should omit to give notice to the insurers of such further insurance, the whole contract should be at an end. This was the condition upon which the insurers were to continue

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liable. It was no less a condition after the assignment than before. The assignee took the contract with knowledge that it might be avoided by a failure to perform this condition. The inference of the court, therefore, that because the assignor of a right in action cannot, directly or indirectly, release such right of action to the prejudice of his assignee, the fact, that subsequent to the assignment of the policy, the assignor effected a further assurance without giving notice as required by the terms of the policy, could have no influence upon the rights of the assignee, is not justified.

Again, it is said by the court, in *The Traders' Ins. Co. v. Robert*, that, "after the assignment of the policy to Bolton, the mortgagee, Robert, in whose name it was originally taken, had no interest in it, and that the rights of the parties were the same as if the policy had been given to Bolton." This, too, is an obvious error. Robert was as much interested in the policy after he had assigned it to his creditor as before. The money for which the insurers might become liable was to be applied to his use. The only effect of the assignment was to make a specific appropriation of the money beforehand to the payment of a specific debt. The insurance was for the benefit of the owner of the property by whom it was obtained; but it was convenient for him, as in the case now in hand, to appoint the particular creditor who should receive the money in case of a loss. The real interest of the party insured remained unchanged.

From the judgment of the supreme court in *The Traders' Ins. Co. v. Robert* there was no appeal. The decision was suffered to become the law of the case. There stood upon the records of the court an absolute, unimpeachable, and irreversible judgment, in favor of Robert against the insurance company. The legal title to the judgment was in Robert. A contingent equitable interest was vested in Bolton, the assignee of the policy. That interest was extinguished by the payment of the debt, to secure which it had been assigned. Thus the entire equitable as well as legal right to the judgment became united in Robert the plaintiff. Under these circumstances, the supreme court, as though aware of the injustice which its decision was likely to work out, made an order, upon motion of the defendant in the judgment, staying all further proceedings thereon, thus practically reversing their own judgment in the case. This order was

reversed by the court for the correction of errors, and, in my judgment, very properly. The decision was put upon the ground that, as a valid judgment had been obtained upon the policy, the payment by Robert of the debt to Bolton, for the security of which the policy had been assigned, "had no other effect than to bring back to him that interest in the policy which he had assigned, and, of course, the interest also in the judgment which had been obtained upon the policy. *Robert v. The Traders' Ins. Co.* 17 Wend. 631.

Were the question left here, I should have little hesitation in saying that the judgment of this court ought not to be controlled by the decision in *The Traders' Ins. Co. v. Robert*. But the same question was before this court in *Tillou v. The Kingston Mutual Ins. Co.* 1 Seld. 405, and was disposed of in a similar way. In that case the insurance had been effected by three partners, and the policy had been assigned to a mortgagee of the premises to secure his debt. Afterwards, one of the partners sold out, and released to his copartners his interest in the property insured. A loss having occurred, an action was brought upon the policy in the name of all three of the partners. The action was defended on the ground that the policy had been rendered void by the alienation. The supreme court held that the transfer of the interest of one partner to his copartners was not such an alienation of the property as would avoid the policy. Judgment was accordingly rendered against the company for the full amount of the loss. The case being brought into this court upon appeal, it was held here, upon the authority of *Murdock v. The Chenango County Mutual Ins. Co.* 2 Comst. 210,¹ that the plaintiffs could not recover for their own benefit on the ground that one of the plaintiffs had no interest in the action.

The question now before the court was decided entirely upon the authority of *Robert v. The Traders' Ins. Co.*, and I think I may be allowed to add, without much consideration. The learned judge who pronounced the opinion of the court, though he had been the successful counsel in the case of *Robert v. The Traders' Ins. Co.*, evidently misapprehended the value of that case as an authority, for he says, after stating the point decided by the supreme court, that "the case afterwards came in a different form before the court for the correction of errors, and that court recognized, approved, and substantially affirmed the judgment." In

¹ *Ante*, vol. 3, p. 36.

this I think he was mistaken. I have already noticed the circumstances under which the case came before the court of errors, and shown that the question now under consideration had already passed beyond the reach of that court. Had it not been so, the report of the case furnished strong ground for the belief that the result would have been different.

The learned judge, further to sustain the authority of *Robert v. The Traders' Ins. Co.*, and to show that the question ought to be regarded as closed against further consideration, proceeded to say, that the case had already been twice noticed in this court, and each time with approbation. In support of this statement, he refers to *Conover v. The Mutual Ins. Co. of Albany*, 1 Comst. 293,¹ and *Murdock v. The Chenango Mutual Ins. Co.*, above cited. In the former of these cases, Judge T. A. Johnson, in delivering the opinion of the court, says: "We are not called upon to decide whether the absolute alienation by Conover, after the assignment of the policy, is a good defence. The point was not raised on the trial. But if we were, I do not see how the interest of the assignee could be affected by it." He then cites *The Traders' Ins. Co. v. Robert*, 9 Wend. 404. Such a notice of an authority, it seems to me, can add but little to its judicial efficacy. In the other case, the approbation is still more faint. Indeed, I construe it into positive disapprobation. Judge Cady, who alone alluded to this authority, says, "It may well be doubted whether the court in that case did not go too far in order to protect the assignee."

Thus the question stands upon authority. *Tillou v. The Kingston Mutual Ins. Co.* contains the only adjudication upon the point in this court. Of that case it is not too much to say, that it was decided without much examination, the court relying chiefly upon the authority of *Robert v. The Traders' Ins. Co.* The value of that case as a precedent was, as I have attempted to show, entirely overestimated. Believing, as I do, that it was decided upon mistaken views of the law applicable to the question involved, and that the decision of the supreme court never had the sanction of the court for the correction of errors, and that the case in this court was determined upon a misapprehension of what had before been adjudged, I regard the question as yet open for the consideration of this court.

Upon the merits of the question, I have already sufficiently ex-

¹ *Ante*, vol. 1, p. 677.

Change of Title. — Subrogation. — Other Insurance.

pressed the convictions of my own judgment. The defendants contracted with McCarty, and not the plaintiff. They agreed, upon the performance of certain conditions, to pay for him to the plaintiff certain money. Some of these conditions were positive in their character; others negative. Certain things were to be done by the assured, and other things were not to be done. If all these conditions were performed, then, if a loss occurred, the defendants agreed to indemnify him against that loss, to the extent specified in the policy, and he appointed the plaintiff, his creditor, to receive from the defendants the amount for which they were thus contingently liable. The terms of this contract have never been waived, relaxed, or modified. The defendants have shown an express violation of one or more of the conditions upon which their liability was to depend. And yet it has been adjudged, although it is evident that it has been done with reluctance, and against the better judgment of the court making the decision, that the proof of these violations constituted no defence to the action.

The judgment should be reversed and a new trial granted, with costs to abide the event.

ROOSEVELT, J., dissented; SELDEN and STRONG, JJ., concurred in the reversal, distinguishing this from the case where a policy is assigned with the assent of the insurers to a mortgagee; they were of opinion that in such case a privity of contract exists between the mortgagee and insurers, and the doctrine of *The Traders' Insurance Company v. Robert* should be maintained.

Judgment reversed, and new trial ordered.

BENJAMIN vs. SARATOGA CO. MUTUAL FIRE INSURANCE CO.¹

(Court of Appeals, New York, June, 1858.)

Change of Title. — Subrogation. — Other Insurance.

The mortgagee of premises insured by him as agent of a company (the application stating the existence of the mortgage) foreclosed the mortgage and became the purchaser at the sale. He then entered into a contract to sell the premises to B., and informed the defendants. They consented thereto, and agreed that the policy should remain valid until the title of B. should be perfected. Afterwards, assessments were made on the plaintiff's premium note and paid. *Held*, that the effect of this consent was to create a new contract of insurance upon which the plaintiff was entitled to sue. Nor were the defendants entitled to be subrogated to the plaintiff's rights against the vendee.

A condition requiring notice of other insurance, *held* not broken by the plaintiff's stating, through mistake, in a notice of further insurance, that the whole was obtained in one company.

¹ 17 N. Y. 415.

THE case is stated in the opinion.

HARRIS, J. The application for insurance, which became a part of the contract between the parties, stated truly that the property was owned by a company, of which Tuthill and the plaintiff were members, and that it was mortgaged to the plaintiff to secure \$9,000. I am inclined to think the policy issued under these circumstances would enure to the benefit of all the parties interested in the property; primarily, perhaps, to the benefit of the mortgagee, and ultimately to the benefit of the owners. But this is a question which, though discussed at the bar, it is deemed unnecessary to determine.

After the insurance had been effected, and while the policy was still in force, the plaintiff foreclosed his mortgage, and, upon the sale, became himself the purchaser. The interest of all the other owners having thus been extinguished, the plaintiff entered into a contract to sell the property to Brainard. This contract was made of the 1st of May, 1846. Subsequently, and before the 31st of July, the plaintiff informed the defendants of this sale. The letter containing this information was not produced upon the trial. But it may be fairly inferred, I think, from the reply received by the plaintiff, that he had informed the defendants that he had become sole owner of the property, and had entered into a contract to sell it to Brainard, and had requested the consent of the defendants to a continuance of the insurance, notwithstanding this change in the ownership. The defendants, accordingly, wrote to the plaintiff on the 31st of July, 1846, consenting to the contract he had made with Brainard, and agreeing that the policy should remain valid until the title of Brainard should be perfected. After this change of ownership, and the consent thus given by the defendants, several assessments were made upon the premium note of the plaintiff, which were paid.

The legal effect of this change of ownership, and the consent of the defendants after notice of such change, that the policy should remain valid until a specified event should happen, was to create a new contract between the parties. Thereafter, however it may have been before, the plaintiff was the real party insured. Being himself the sole and absolute owner of the property, the policy became as effectual for his indemnity as a new policy issued to him in his own name, and describing him as such owner,

Change of Title. — Subrogation. — Other Insurance.

could have been. Indeed, the transaction was but a short mode of making an entirely new contract of insurance.

At the time of the loss, the plaintiff was still the legal owner of the property. By the terms of their contract, the defendants agreed with the plaintiff that they would pay him all losses or damage, not exceeding the sum specified, which should or might happen to the property by fire, during the time the policy should remain in force. The loss or damage was to be estimated according to the true and actual value of the property, and not according to the state of the accounts between the plaintiff and his vendee at the time the loss or damage should happen. To the extent of this loss, by the very terms of the contract, the plaintiff was entitled to recover.

Nor, whatever may be the doctrine on the subject when a mortgagee obtains an insurance for his own benefit, are the defendants in this case entitled to be subrogated to the claim of the plaintiff against his vendee. By the terms of the contract of sale, of which the defendants had notice, the vendee agreed to pay the plaintiff the premium for keeping the property insured for at least the sum of \$6,000. Whether he, in fact, paid the assessments upon the plaintiff's note to the defendants does not appear; but I think the fair interpretation of the agreement, that the policy should continue valid until the title should be perfected in Brainard, is, that the indemnity for which the policy provides should enure to the benefit of Brainard, as well as the plaintiff. To the extent of Brainard's equitable interest in the property, the plaintiff is to be regarded as holding the policy in trust for him.

One other question remains to be noticed. The policy contains the usual condition, that if any other insurance should be made upon the property, the plaintiff should, with all reasonable diligence, give notice thereof to the defendants, and have the same indorsed on the policy, or otherwise acknowledged in writing. Further insurance was effected to the amount of \$6,000, of which the defendants were notified. But by mistake, and without any fraudulent design, as the judge who tried the cause has found, it was stated in the notice of such further insurance, that the whole amount had been effected in the Howard Insurance Company; whereas, in fact, half the amount mentioned in the notice was insured by another company. It is insisted that

Authority of Agent.

this mistake amounted to a violation of the condition of the policy on this subject, and thus rendered the contract void. But this position cannot be maintained. The policy provided that in case of other insurance, the defendants should only be liable for such ratable proportion of any loss or damage which might happen to the property, as the amount of their insurance should bear to the whole amount insured. It was, therefore, for the interest of the defendants, that other insurances should be effected. The greater the amount of insurance, the more their risk would be diminished. For the same reason, the defendants had an interest in knowing what other insurances were made upon the property; that thus they might also know for what proportion of any loss which might happen, they would be liable. But they were only interested in knowing the amount of such further insurance. By whom it had been made, it did not concern them to know. Both the terms and the object of the condition in the policy would be satisfied by a notice of the fact that further insurance to a specified amount had been effected, without specifying the particular persons or companies who had made such insurance. It was enough, in this case, for the plaintiff to inform the defendants of the true amount of insurance he had effected. This was all that was material for them to know. It was all, too, that the condition of their policy demanded.

I am of opinion that the facts established upon the trial, as they were found by the judge, entitled the plaintiff to recover. The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

COMSTOCK, J., did not sit in the case; all the other judges concurring, *Judgment reversed, and new trial ordered.*

BENTLEY vs. COLUMBIA INSURANCE CO.¹

(Court of Appeals, New York, June, 1858.)

Authority of Agent.

An under agent of an insurance company has no authority to issue a policy to or to make an agreement to insure himself. Nor has a general agent, to whom such under agent sends an application, any power to issue a policy on property after loss, though the application was made before, especially if the general agent knew of the loss at the time.

WHITNEY, a general agent of the defendants, appointed the plaintiff an under agent, with power to make binding contracts

¹ 17 N. Y. 421.

 Authority of Agent.

for insurance. The plaintiff proposed the insurance to Whitney in a letter to him, in these terms: "C. W. Bentley, \$4,000 on flour, grain, and country produce . . . in his storehouse at Albany." The night after this letter was sent, the property was consumed, and Whitney, having learned the fact, but deeming himself bound to execute a policy, did so. Upon this policy the action was brought.

JOHNSON, C. J. Even if, upon the evidence, there was ground to hold that Bentley's appointment as sub-agent by Whitney was authorized or ratified by the company, as to which I express no opinion, he had not authority to issue a policy, or to make an agreement to issue a policy to himself. This point was adjudged in *The New York Central Insurance Company v. The Protection Insurance Company*, 14 N. Y. 85.¹ There was, therefore, no contract to insure, nor anything tending towards a contract, except a bare application for insurance, before the loss had actually taken place. The agent in New York did not receive the application until after the loss had occurred, nor did he do any act accepting the risk until after the loss was known to him. In *Taylor v. The Merchants' Fire Insurance Company*, 9 How. U. S. R. 370,² the law on this subject is laid down in accordance with the settled rule in respect to the acceptance of propositions for contracts relating to other subjects, that a proposition becomes a binding contract when the party to whom it is made signifies his acceptance of it to the proposer. In that case, where the proposition was sent by mail, mailing an answer of acceptance was held to be conclusive. The same doctrine is held by this court in *Vassar v. Camp*, 1 Kern. 441, following *Mactier v. Frith*, 6 Wend. 104, where it was held that the doing of some overt act of acceptance, as mailing a letter of acceptance, would consummate the contract. There was in this case no contract at the time of the loss, nor any before the loss was known to the agent. Nor does the case furnish any evidence of authority to Whitney to enter into agreements to pay for losses [which had] already occurred, when the company he represented was under no precedent obligation.

The judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

¹ *Ante*, p. 96.

² *Ante*, vol. 3, p. 94

Sale. — Assignment. — Consent.

HOOPEE vs. HUDSON RIVER FIRE INSURANCE CO.¹

(Court of Appeals, New York, June, 1858.)

Sale. — Assignment. — Consent.

A policy for a long period upon goods in a retail shop applies to the goods successively in the shop from time to time.

A sale of property insured does not avoid the policy, but only suspends it; and a subsequent assent to an assignment thereof to the purchaser revives it.

An assignment of a policy, being of no avail except in case of an interest in the assignee in the subject insured, a request made to an insurance company to consent to an assignment to the plaintiff is notice to them that he had acquired, or was about to acquire, an interest in the insured property. And if the company desire to know the nature of that interest, it is incumbent upon them then to make inquiry.

THE property insured, consisting of goods in a retail store, was sold on execution, the plaintiff being the purchaser. The plaintiff thereupon applied for and obtained consent to an assignment of the policy, but without stating the nature of his interest in the property. Any transfer or termination of the interest of the assured was declared by the policy to avoid the contract, if not made with the written consent of the insurers.

PRATT, J. It was manifestly the intention of the parties to the policy in this case, that it should cover to the amount of the insurance any goods of the character and description specified in the policy, which, from time to time during its continuation, might be in the store. "A policy for a long period upon goods in a retail shop applies to the goods successively in the store from time to time." Phil. on Ins. § 491; Ang. on Ins. § 203; *Lane v. Maine Mutual Fire Insurance Company*, 3 Fairf. 44. Any other construction of a policy of insurance upon a stock in trade continually changing, would render it worthless as an indemnity. It is a primary principle in the construction of the contract of insurance, to give it the effect as an indemnity which the parties to it designed. The sale, therefore, of the stock by the insured did not render the policy void.

After the sale and previous to the assignment of the policy to the purchasers, the effect of the policy as an indemnity was suspended, not from any vice in the policy, but from the absence of a subject for it to act upon. Had a fire occurred during this time, no recovery could have been had against the underwriters; not because the policy had become void, but because the insured had suffered no loss. The owners of the goods would have had no

¹ 17 N. Y. 424.

claim, for the reason that at the time they had no interest in the policy; yet the policy continued to be a valid subsisting contract in the hands of the insured, and had they subsequently purchased the same goods or other goods, and brought them into the store, they would have been covered by it. And having been assigned to the plaintiff by consent of the company, he took the place of the insured, and the policy reattached to the goods. The plaintiff, therefore, was clearly entitled to recover.

It was insisted, upon the argument, that the company had no notice of the sale to Hooper. The fact that he requested an assignment of the policy was sufficient notice that he had acquired, or was about to acquire, some interest in the goods.

The assignment of the policy, in order to be of any benefit to the assignee, must be accompanied with a transfer of some kind of interest in the subject of insurance to the assignee. This seems to be assumed by all the elementary writers. Ellis says that "the mere assignment of a policy would be useless unless the subject insured be assigned also." Ellis, Law of Ins. 69. Marshall, in his work on insurance (p. 800), says: "A policy of insurance, being a *chose in action*, is in strictness not assignable at law, but, like every *chose in action*, may be assigned in equity. But the mere assignment would be of little avail without an assignment of the subject matter of the insurance also." He puts it upon the ground that the insured must have an interest, not only at the time of insuring, but also at the happening of the loss. The same doctrine is expressly recognized in all the elementary works upon the law of insurance which I have been able to consult, and it has never been controverted, to my knowledge, in any adjudicated case. 3 Kent Com. 375; Ang. on Ins. § 193; 1 Phil. on Ins. § 77.

Besides, a fire policy seems not to be assignable at all except with the consent of the underwriters. Ellis says: "These policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another without the express consent of the office." Ellis's Law of Ins. 72; Phil. 78; Marsh. 803. And when the assignment of the policy, by the consent of the insurers, is absolute, to one who has become the entire owner of the subject of insurance, it becomes a new contract of insurance between the underwriters and the assignee. "If the assignment, taken in connection with the policy, plainly

Preliminary Proofs. — Waiver. — Parol Evidence. — What Policy covers.

transfers the assured's whole interest, the underwriter's consent to it is evidently equivalent to his agreement to become directly answerable to the assignee. In such case the proceedings to enforce payment may be in the assignee's name, and he become to all intents and purposes the substituted party to the contract." Phil., *supra*, § 84; Ang., *supra*, § 193; Ellis, 69. And if he becomes the real party to the contract of insurance, it would be as necessary that he should be vested with an interest in the property insured as if he had taken out a new policy in his own name.

An assignment, therefore, being of no avail except in case of an interest in the assignee in the subject insured, the request made to the defendants to consent to an assignment to plaintiff was of itself notice to them that he had acquired, or was about to acquire an interest in the insured property. If, therefore, it was important to the defendants to know what the nature of the interest was which the plaintiff had acquired, they should have asked for information in respect to it. If they were content to give their consent without such inquiry it was their own fault.

The judgment of the supreme court must be affirmed.

DENIO, J., dissented; all the other judges concurring,

Judgment affirmed.

NOTE. But *quære* if the above doctrine that alienation only *suspends*, and does not abrogate the contract, is not confined to cases in which there is no stipulation that an alienation shall render the policy void? Cannot the parties agree that the policy shall become absolutely void upon an alienation; so that, as a consequence, even a repurchase of the property by the insured would not revive his interest? See *Worthington v. Bearse*, 12 Allen, 382, where, speaking of the effect of the sale of an insured vessel (which was repurchased

by the vendor) upon the contract of insurance, Bigelow, C. J., says, that the contract "was only suspended during the time that the title to the vessel was vested in the vendee, and was revived again on the reconveyance to the insured during the time specified in the policy. The insurance was for one year. *There was no stipulation or condition in the policy, that the insured should not convey or assign his interest in the vessel during this period.*"

KERNOCHAN vs. NEW YORK BOWERY FIRE INSURANCE CO.¹

(Court of Appeals, New York, June, 1858.) *Preliminary Proofs.*

— *Waiver. — Parol Evidence. — What Policy covers.*

An insurance company cannot object at the trial that the insured did not himself furnish the proofs of loss if no objection was made at the time they were presented.

Evidence of an agreement between the plaintiff, a mortgagee, and C., mortgagor of the premises, that the former should keep the premises insured, and the latter should pay

Membership of Company.

the premiums and have the benefit of the insurance is admissible in an action upon a policy in which such facts do not appear. And whether the insurers knew of such agreement when they issued the policy is immaterial.

Where a mortgagee insures property in his own name, without stating the nature of his interest, the insurance is upon the property and not upon the mortgage debt. Nor is a mortgagee bound to disclose the nature of his interest without inquiry.

MELLEN vs. HAMILTON FIRE INSURANCE CO.¹ (Court of Appeals, New York, June, 1858.) *Assignment. — Subsequent Insurance. — Timely Notice.*

The clause in a policy of insurance forbidding assignment refers to assignment before loss. The knowledge of a general agent of the defendants of the fact that the plaintiff had procured a subsequent insurance, *held* not to affect the defendants.

If the only purpose for which notice of a subsequent insurance is required were that of enabling the prior insurers to ascertain for what proportion of a loss they might eventually be liable, no such notice would seem to be necessary until the actual occurrence of a loss, since if given then it would fully answer the purpose for which alone it was intended. But this is not the only or the principal reason for requiring express notice of every further insurance. By one of the conditions annexed to the policy in suit, the company may elect, at any time and for any cause, to terminate the insurance, by giving notice to the assured and retaining a due proportion of the premium; and to enable an insurance company to exercise properly this discretionary power, it is important that it should have a timely knowledge of the facts upon which its exercise will usually depend. Therefore, *held*, that an unexplained delay of nineteen days is conclusive proof of the want of that "reasonable diligence" which the policy required.

BELLEVILLE MUTUAL INSURANCE COMPANY, appellants, vs.
ADOLPHUS W. VAN WINKLE, respondent.²

(Court of Errors and Appeals, New Jersey, June Term, 1858.)

Membership of Company.

The fifth section of the charter of the company provides, "that all policies, or contracts founded thereon, shall be subscribed by the president, and attested by the secretary, and the said company shall be liable for all loss or damage by fire or other casualty, agreeably to the terms thereof." The sixth section provides, "that every person who shall become a member by effecting insurance shall, before he receives his policy, deposit his promissory note for such a sum of money as shall be determined by the directors." The eighth section provides, that every member of said company shall be bound to pay for losses, and in proportion to the amount of his deposit note; and the company shall have a lien on the building insured to the amount of the note, when they shall file a memorandum with the clerk of the county. *Held*, that the deposit of the note is a condition precedent, without which no one can become a member; and no one can be insured, directly or indirectly, without becoming a member, or at least without placing himself in a situation so that he is entitled to be a member, and is prevented by fault of the company.

The directors of a mutual insurance company, or their officers, by their direction or approval, may so act as to entitle a person to become a member who, by the fault of the officers of the company, has been prevented from depositing his note, and so as to authorize a court of equity to compel his being received.

All persons applying to become members of an incorporated insurance company must be presumed to have known the terms of its charter and by-laws.

¹ 17 N. Y. 609.

² 1 Beas. 333.

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THE case sufficiently appears in the opinions to make intelligible the principles decided.

WILLIAMSON, C. The complainant's factory, with its fixtures and stocks therein, located at Jersey City, was destroyed by fire on the 22d day of April, 1849. The complainant alleges, in his bill, that he was insured in the Belleville Mutual Insurance Company for the sum of fifteen hundred dollars. The object of this suit is to procure the benefit of that insurance. The policy of insurance, though made out and executed, was never delivered. That is the reason why a court of equity is resorted to for redress. The prayer of the bill is, that a just and true account may be taken, under the direction of this court, of the amount of the complainant's loss and damage sustained by him, by the destruction and injury, by fire, of his machinery, stock, and fixtures; and that upon such account being taken, it may be decreed that the said company shall pay to the complainant the said sum of fifteen hundred dollars, or so much thereof as may be sufficient to make good the complainant's loss and damage by the fire — to which is added a prayer for general relief.

The defendants start the preliminary objection, that independent of the merits of the case, the complainant is not entitled to relief upon his bill, as it now stands. The ground of the jurisdiction of this court undoubtedly is to enforce the specific performance of the agreement to insure. It would have been more appropriate and formal to have prayed for a specific performance. But this is a mere formal matter, and is not essential. The bill states all the facts which are necessary to enable the court to make any decree which the complainant may be entitled to under the prayer for general relief. As a general rule, the complainant, under a prayer for general relief, is entitled to any specific relief warranted by the frame and structure of his bill. Story's Eq. Pl. §§ 41, 42, 43, and notes.

Is the complainant entitled to relief? It is established beyond doubt, by the pleadings and proofs, that an agreement was entered into between the complainant and the defendants for the insurance. On the 16th of March, 1849, John Kennedy, the secretary of the company, addressed the following letter to the complainant, and sent it to him by mail:—

“DEAR SIR,— Mr. Williams informs me to-day that after consulting with the committee, they agreed to take your property

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at three per cent., and requested me to write you. If you agree to it, please write, and I will send you your policy at once.

“Yours, JOHN KENNEDY.”

The bill alleges that the complainant answered this letter immediately by mail, accepting the proposition. There is no proof of any answer by letter. But the complainant proves that he did call upon Mr. Kennedy, and asked him if had received his letter; and upon Mr. Kennedy's replying in the negative, the complainant said he had sent one to him, accepting the terms of the company. He then requested Mr. Kennedy to make out his policy at once. Mr. Kennedy promised he would do so. The complainant offered to pay the balance of the money required (the company having in their hands a small amount of money belonging to the complainant). Mr. Kennedy said it was no matter; that he did not know how much the balance would be; he might hand him the money at any time. The complainant then asked him if he was insured; to which Mr. Kennedy replied — Yes, most assuredly; and that he would make out the policy right away, and send it.

On the 20th of April, Mr. Kennedy wrote to the complainant as follows: —

“DEAR SIR, — I inclose you the note. You will please have it signed, and by return mail, or as soon as you can, send it to me, with the percentage, and I will send you your policy. You will please inclose to me \$7.20. Yours, JOHN KENNEDY.”

The policy was in fact executed on the 18th day of April, and remained in the hands of the secretary, Mr. Kennedy. The note referred to in Mr. Kennedy's last letter was one of the printed notes of the company, which they always furnished their members. It was filled up for the sum of \$247.50, and was to be signed by the complainant and some other individual, as surety for its payment. The letter of the 20th of April was put in the post-office at Belleville on the 21st of April. On the 22d of April, and before the note could be returned, the fire occurred. Afterwards the complainant tendered the note and the amount of money required, and demanded his policy, which the company refused to deliver.

I can see no reason why the complainant is not entitled to a specific performance of this agreement. If it was entirely in parol it would be no objection to giving the complainant relief. There is nothing in the statute or in the common law requiring

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such an agreement to be in writing. *Sandford v. The Trust Fire Ins. Co.* 11 Paige's Ch. 548; *Union Mutual Ins. Co. v. Commercial Mutual Marine Co.* 2 Curtis R. 324; *The Trustees of First Baptist Church v. The Brooklyn Fire Ins. Co.* 18 Barb. 69.

But this agreement was reduced to writing. The terms were stated and made known in writing by the authorized agent of the company to the complainant, who accepted the same in writing. If the fire had not occurred so soon after the making of the agreement, there would have been no difficulty. The defendants interpose now no obstacle, except that the agreement was not fully executed when the fire occurred. It was perfectly competent for either party to have stipulated that the agreement should not be binding until the papers were mutually exchanged. So far from this being the case, the contrary was agreed upon by the parties. The secretary of the company told the complainant that he was insured. It is true there was no executed agreement. If there had been, there would have been no necessity for this suit. But there was an agreement that, upon the complainant complying with certain terms, he would have his policy. He has complied with those terms, and now asks that the defendants may be compelled to execute the policy. They say no; and excuse themselves on the ground that the building was burnt. But it was through their own default and delay that the complainant did not receive his policy before the misfortune of the fire. They should be the sufferers for their own negligence, and not the party who is innocent. A company can act only through its agents. Mr. Kennedy was their agent, and they, and not the complainant, should suffer for his negligence. The agreement was part performed. The company had in their hands a part of the premium, and retained it on this agreement, which they now refuse to execute.

It is insisted, by the answer, that by the act incorporating the company, the agreement was not binding until the premium note was actually deposited with the company. The language will not admit of that construction. The section referred to, which is the sixth section of the act, declares, "That every person who shall become a member of said corporation, by effecting insurance therein, shall, before he receives his policy, deposit his promissory note for such a sum of money as shall be determined by the directors; and that a part, not exceeding five per cent. of said note, shall be paid," &c. The complainant has never asked, and does

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not now ask, that the policy shall be delivered to him until he deposits his premium note as the act requires. His complaint is, that the company will not deliver to him his policy, notwithstanding his offer to fulfil his part of the agreement by a deposit of the note. The notes which the company required were notes prepared and printed by the company, and furnished to the insured. Their agent undertook to furnish the company a blank note to be filled up. His delay has caused all the difficulty, and a court of equity ought to protect him. A court of law cannot. It is the refusal of the company to comply with their part of the agreement of which the complainant complains. If, after the agreement was made, the complainant had refused to deposit his note, the company could have enforced the agreement, and compelled him to give the note. If a loss had occurred to any other member of the company, the company could have assessed a proportion of such loss upon this note, and might have appropriated the whole of it to meet the loss, if so much had been required for the purpose. If the company could have subjected the complainant to the burden of the agreement, it is equitable that he should be entitled to enforce it for his own benefit.

The agreement was *bonâ fide* entered into by the parties. Both parties considered the complainant insured. The complainant rested securely upon the representations of the officers of the company, and upon the agreement being carried out in good faith.

The complainant is entitled to a specific performance of the agreement. There being no dispute between the parties as to complainant having taken all the preliminary steps to entitle him to a remuneration of his loss, if he is entitled to the policy, he is entitled in this suit to recover the same amount as he would be in an action at law upon the policy. Let there be a proper reference to a master for that purpose.

From this decree an appeal was taken, and the cause, on appeal, was argued by *J. P. Bradley & W. Pennington*, for the appellants, and by the same counsel as in the court of chancery for the respondent.

The opinion of the court was delivered by

ELMER, J. The company alleged to have made the agreement to insure, sought to be enforced in this case, is a mutual company, the fifth section of whose charter, Acts of 1839, 118, provides, "that all policies, or contracts founded thereon, shall be sub-

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scribed by the president, and attested by the secretary, and the said company shall be liable for all loss or damage by fire or other casualty, agreeably to the terms thereof." The sixth section provides "that every person who shall become a member by effecting insurance shall, before he receives his policy, deposit his promissory note for such a sum of money as shall be determined by the directors." And the eighth provides, that every member of said company shall be bound to pay for losses, &c., in proportion to the amount of his deposit note, and the company shall have a lien on the building insured to the amount of the note, when they shall file a memorandum with the clerk of the county.

In my opinion, the meaning of these provisions is, that every person effecting insurance in the company must become a member of it, and deposit his premium note, as required. The aggregate of these notes forms the capital to which all the members look for security. In the nature of things, a deposit of the note is a condition precedent, without which no one can become a member; and no one can be insured, directly or indirectly, without becoming a member, or at least without placing himself in a situation so that he is entitled to be a member, and is prevented by the fault of the company. No mere agreement to insure can effect this. So to hold is to render nugatory the plain requirements of the act, which are, that policies shall be signed by the president, and attested by the secretary, and that the insured shall deposit his note before he receives his policy. Hence, all the testimony introduced into the case of the general usage of insurance companies having no such restrictions in their charters to consider the insurance as commencing when the terms are mutually agreed upon, and all the cases, at law or in equity, enforcing such agreements, are inapplicable. No previous case has gone the length of the decision of the chancellor in this. The case of *Dur-rar v. Insurance Co.* 4 Zab. 193,¹ before the supreme court, was the case of a mutual company having a charter very much like that now before us. It was there held, that there was a transfer of the property and an assignment of the policy assented to by the secretary entered on the books of the company, and acts done which implied that the directors were satisfied with the original note; a new note was not necessary to make the assignee a mem-

¹ *Ante*, vol. 3, p. 607.

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ber ; but there was no intimation that a mere agreement to insure without the deposit of any note would be sufficient to constitute an original member, or that such an agreement would bind the company.

The case most relied on by the counsel of the appellees was that of *Union M. Ins. Co. v. Commercial M. Ins. Co.* 19 How. 318. But in that case no question was made about a premium note, nor did the charter of the insuring company require its deposit. It was held that, under the Massachusetts statute, a mere agreement to insure bound the company, and this was not denied in the answer. The constant usage of the company was to intrust the president with the power to bind them by a verbal agreement.

But I do not doubt that the directors of a mutual company, or their officers, by their direction or approval, may so act as to entitle a person to become a member who, by their fault, has been prevented from depositing his note ; and as to authorize a court of equity to compel his being received, or to give the same relief he would be entitled to if he was. These companies are just as much bound to act with good faith as any others. It remains therefore to inquire whether, as was insisted for the appellee, the facts proved show a want of good faith on the part of company, and entitle him to a decree on that ground.

A previous application for insurance it appears had been made while the stock and machinery was in the township of Aquackanonk. Whether it was or was not effected is immaterial, the property having been removed into the township of Van Vorst, where it was burnt. After this removal, the appellee applied to the secretary for a renewal of the policy. A correspondence ensued, and on March 16th, 1849, Mr. Kennedy, the secretary, wrote to him as follows : "Mr. Williams informed me to-day that, after consulting with the committee, they agreed to take your property at three per cent., and requested me to write you. If you agree to it, please write, and I will send you your policy at once." There is no proof of any answer to this letter, but there is evidence that he called on the secretary, and asked him if he had received his letter ; and upon his replying in the negative, the appellee told him he had sent one accepting the terms, and requested him to make out the policy at once, offering to pay the money required. The secretary promised to do so, and said

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it was no matter about the money ; he did not know how much the balance would be — he might hand it to him at any time. The appellee then asked him if he was insured, to which the secretary replied — Yes, most assuredly ; and he would make out the policy right away, and send it.

A policy was made out in full, and placed in the secretary's hands, dated April 18th. On the 20th, the secretary wrote to the appellee, inclosing the usual printed note, properly filled up, as follows : " I inclose you the note. You will please have it signed, and by return mail, or as soon as you can, send it to me with the percentage, and I will send you your policy. You will please inclose me \$7.20." This letter was put in the post-office at Belleville on the 21st, and on the 22d, before the note could be returned, the fire occurred. On the same day the appellee tendered the note, signed by himself and a competent surety, and the money required, and demanded his policy.

Mr. Kennedy, who was examined as witness for the company, does not confirm the testimony of the other witnesses ; but assuming it to be satisfactorily proved that the secretary did tell the appellee, previous to the 20th of April, that he was fully insured, and that he sometimes told other persons the same thing under like circumstances, and that some of the directors of the company had occasionally made similar declarations, I cannot regard these facts as sufficient to fix the blame on the company of the non-delivery of the premium note and policy. The appellee, like all others applying to become members of the company, must be presumed to have known the terms of their charter and by-laws. Angell, § 10. These expressly forbade any person becoming a member until the premium note was deposited. No officer had any right to dispense with this condition, and no person had any right to rely on assurances that it could be done. If this be admitted, charters and by-laws are of no value. I do not doubt that the directors of such company may dispense with them, so far as to bind the company to make good damages occasioned by their conduct, or the conduct of officers, which they have sanctioned, acting in violation of them. This is implied in holding them liable for a fraud. But the sanction of the directors to acts violating the charter and by-laws is not to be presumed. To enable a party to claim on such a ground, it must be satisfactorily proved. In this case there is no proof that the directors ever

Use of Premises. — Additions. — Increase of Risk.

authorized the declarations alleged to have been made by their officers, either before they were made, or by adopting and sanctioning them afterwards. No doubt the common usage of joint stock companies, of considering an insurance as commencing when the agreement was perfected, was often inadvertently supposed to apply to this company; but, in my opinion, those who acted on this supposition did so at their own peril. Bound to know the terms of the charter and by-laws, as the appellee was, it was his duty to see that the premium note was duly made and deposited, and he had no right to wait until it was sent to him by the secretary.

The decree of the chancellor was reversed by the following vote:—

For affirmance: Judge Cornelison.

For reversal: Judges Green, Elmer, Ogden, Potts, Ryerson, Haines, Swain, Valentine, Vredenburg, Risley.

JOHN T. ROBINSON vs. MERCER COUNTY MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, New Jersey, June Term, 1858.)

Use of Premises. — Additions. — Increase of Risk.

A proviso in a policy of insurance, that if the premises above mentioned shall, at any time when such fire shall happen, be in whole or in part occupied for purposes considered hazardous, unless liberty so to occupy them be expressly stipulated for, this policy shall be void. *Held*, to apply to a building in which a printing-press that was insured was contained, and to that into which it was subsequently removed by consent of the insurers. The addition of a steam-engine, cupola-furnace, foundry, and blacksmith forge to a back building connected with that containing the press, *held* to be evidence of an increase of risk, such as was forbidden by the proviso.

If there is no stipulation in the policy against an increase of the risk, good faith requires the assured, if he exposes the property to a risk far more hazardous than could have been contemplated by the insurers, to notify them of the change, and a neglect to do so may be considered evidence of gross negligence, which will avoid the policy.

THIS was an action of covenant, commenced in the supreme court, on a policy of insurance.

The cause was tried at the Mercer circuit, at April term, 1857, and a verdict rendered for the plaintiff for the amount of the insurance and interest. On the return of the *postea* to this court, the defendants obtained a rule to show cause why the verdict should not be set aside and a new trial granted. The facts in the case and the points made on the argument sufficiently appear in the opinions delivered in this court.

¹ 3 Dutcher, 134.

Argued at February term, 1858, before the Chief Justice and Justices Elmer, Haines, and Vredenburg.

ELMER, J. This is an action of covenant on a policy of insurance, bearing date April 27, 1846, whereby the defendants insured the plaintiff, to the amount of \$400, against damage or loss by fire, for ten years, upon "a new double Adams printing-press, contained in a frame building in the rear of the printing-office, in a room sixteen by eighteen feet, said press, with its fixtures, being valued at \$600." On the 13th of March, 1847, the secretary of the company indorsed on the policy, "The property described and insured in the annexed policy has been removed to a brick building, known as the Robert Voorhees property, on the north side of Nassau Street, in Princeton, and the company hereby signify their consent to such removal." The press remained in this last mentioned building until it was destroyed by fire, in June, 1855. No other description of the property or of the building was given but that above stated.

Following the description and valuation of the property, the policy contains this proviso: "Provided, that if the premises above mentioned shall, at any time when such fire shall happen, be in whole or in part occupied for purposes considered hazardous, unless liberty so to occupy them be expressly stipulated for, this policy, and every clause, article, and thing therein contained, shall be void and of no effect." Annexed are various conditions. The sixth is: "If any alterations which tend to increase the risk shall be made in any building or buildings insured by this company, such alterations shall be reported to the office of the insured within thirty days after the same shall have been made, and the additional premium which may be required by the managers paid, otherwise the insurance shall become void." The ninth is: "If any furniture or personal property insured in this policy shall be removed from the dwelling or other building where the same is stored or located at the time of effecting such insurance, this policy shall be null and void and of no effect, and shall remain so until such removal be made known to, and approved of and indorsed on the policy by the secretary or president of the company."

Several pleas were pleaded; but, on the trial, the defence was rested mainly on the allegations, that the building which contained the property insured was occupied, at the time of the fire,

for purposes considered hazardous; that alterations were made which tended to increase the risk, and not reported to the company; and that the fire was occasioned by alterations which materially increased the risk. A verdict having been rendered for the plaintiff, a rule was obtained, on behalf of the defendants, that he should show cause why it should not be set aside and a new trial ordered; and this rule having been argued, it is now moved to make it absolute.

The principal reasons relied on for a new trial were, that the judge erred in his charge to the jury, which was, in substance, that neither the proviso nor the sixth condition applied to personal property insured; and that he erred in that part of his charge where he instructed them, that to defeat a recovery, the defendants should have satisfactorily shown that the fire originated in the hazardous use of the premises by the plaintiff without their authority. It was also assigned as error, that the judge admitted illegal evidence.

I think the judge was right in considering the sixth condition annexed to the policy as not applying to this case. That condition is, by its very terms, limited to alterations made in buildings insured by the company, and consequently can have no application to personal property.

But, in my opinion, he fell into error in instructing the jury that the proviso must be limited in the same way. A contract of insurance, like every other contract, must be construed liberally, so as to accord with the intention of the parties. Angell, §§ 12, 96. The phrase, "premises above mentioned," properly describes the building in which the press was contained, for the only premises before mentioned was that building. When the press was removed to another building, and the removal was approved of and indorsed on the policy, the building into which it was removed became the "premises above mentioned," and the proviso then applied to it. This view of the case was evidently in the contemplation of both parties to the contract. The building in which the press was contained is described, not for the purpose merely of identifying the press, but for the purpose of ascertaining the hazard and determining the rate of insurance. The hazard of the building was, in fact, the real hazard incurred, there being little or no danger of the press being burned in any other way than in consequence of the burning of the building contain-

ing it. Upon the construction put on the contract at the trial, the proviso was rendered wholly nugatory, and the company was left without the protection both parties must have understood it was intended to secure.

It is true that there is some difficulty in ascertaining precisely what is meant by the phrase, "purposes considered hazardous," in this proviso, there being no classification of risks or premiums annexed to the policy, as is customary, and no such classification having been adopted by the company. But evidence was given that the defendants did not insure buildings of the character of that containing the press, connected as it was with the back building which adjoined, and was substantially a part of it, after the steam-engine, foundry, blacksmith shop, and cupola furnace were added in the year 1853. And although it appeared that the assured was charged the highest rate of premium ever taken by the company, it also appeared that this rate was far below the rates charged by other companies for such risks as this became after the alterations were made. Even if the proviso was struck out of the policy entirely, good faith required the assured, if he exposed the property to a risk far more hazardous than could have been contemplated by the insurers, to notify them of the change, and give them the option of continuing or terminating the risk. Angell, § 162; *Stebbins v. Globe Ins. Co.* 2 Hall, 632.¹ I think it can hardly be doubted that had the change in the risk been made known to the company, they would not have agreed to continue the insurance. There was some contradiction in the evidence on the question, whether the risk was materially increased; but, in my opinion, taking the facts stated, and discarding the mere opinions of witnesses, which are so apt to lean to the unfortunate, and are entitled to but little consideration, they are too strong to leave it doubtful. It is, indeed, difficult to shut our eyes to the fact, that the change of occupation changed the risk from one that was ordinarily regarded as hazardous, to one that was by all insurance offices considered as extra hazardous, if not of a special and extraordinary character. Some witnesses think, and so testified, that if proper precautions are used, steam-mills, cupolas, and foundries are not specially hazardous; but the practice of all insurers, and the common experience of life, prove the contrary. In my opinion, the decided weight of evidence was that the risk was so changed as to come within the proviso, and

¹ *Ante*, vol. 1, p. 316.

so that good faith and fair dealing required that the company should be notified, and permitted to choose whether they would continue to insure the property for the premium paid, or for any other premiums that might be agreed on. The omission, on the part of the assured, to give this notice, although it may have been, and I doubt not was a mere inadvertence proceeding from no improper motive, was of such a character as may be properly treated as gross negligence, which ought to exonerate the company.

Had the question arising in this case in regard to the character of the alterations, and the degree of negligence that ought in consequence to be imputed to the plaintiff, been distinctly submitted to the jury, it might have been proper to acquiesce in their decision. But I am not satisfied that it was. The bearing of the charge was strongly for the plaintiff. In one part of it the judge says, "It clearly appears, without contradiction, that all the alterations made to the building would diminish, instead of increase the risk of its being burned." This remark, probably, was meant to be applied only to the brick building itself; but I find nothing to qualify it, and there is much reason to fear it may have unduly prejudiced the defence. As applied to the whole building, including the back building or wooden shed which was connected with it, and actually communicated the fire to it, the evidence, in my opinion, hardly warranted it. The charge, after a strong intimation that even if the jury was satisfied that the alterations in the main building tended to increase the risk, this would not vitiate the policy, because the parties, when making it, did not so stipulate, closes with the direction, that "to defeat a recovery, the defendant should have satisfactorily shown to you that the fire originated in the hazardous use of the premises by the plaintiff without their authority or acquiescence."

How the fire originated was material, so far as it bore on the question of the change of risk, and of the prejudice thereby resulting to the defendants. But it was not necessary, to entitle them to a verdict, that they should show that it originated from the alterations. That it did in fact commence in that part of the building containing the new erections, was a fact proper to be submitted to the jury, to be weighed by them as evidence in regard to the increase of the risk. As the case appeared upon the evidence, I think the true question which ought to have been

submitted to the jury was, does the evidence satisfy you that, at the time when the fire happened, the building containing the press, including therein the back building as a part of it, occupied for a purpose considered hazardous, — that is to say, in a manner so materially hazardous, compared with the hazard when it was originally removed there by consent of the company, — as to make the risk of a different character from that contemplated by the parties? Not being satisfied that this question has been fairly considered, I think it ought to be submitted to another jury.

Besides the reasons growing out of the judge's charge, it was insisted that an error was committed in permitting two of the witnesses to give evidence to show that although the new erections may have increased the risk, other changes diminished it, so that, upon the whole, the risk was no greater at the time of the fire than when the press was first removed. It does not very satisfactorily appear that evidence of this character was admitted, and the judge, in his charge, distinctly stated that this mode of viewing the case was not correct. I do not see that this objection is sustained.

Another reason for a new trial, insisted on, was, that evidence was admitted to prove that one Hulfish was an agent of the company for making surveys in Princeton, and frequently passed by after the alterations complained of were made, and might have seen them from the street. This was undoubtedly an error. It did not appear that Hulfish had any power to approve an increase of the risk, or that it was any part of his duty to inquire in regard to changes, or to notify the company. His seeing or not seeing the alterations made, was a fact wholly immaterial and irrelevant. The rule for a new trial must, for the reasons assigned, be made absolute, the costs to abide the event of the suit.

The CHIEF JUSTICE. I concur in thinking that a new trial should be granted. In addition to the reasons relied on by Justice Elmer, I think there was an error committed upon the trial touching the true interpretation of the contract of insurance. That contract is briefly as follows: "The sum of \$400 is hereby insured unto John Robinson, for the term of ten years, upon the following described property: a new double Adams printing-press, contained in a frame building in the rear of the printing-office, in a room sixteen by eighteen feet (said press and its fix-

tures being valued at six hundred dollars — survey on file in this office); provided that if the premises above mentioned shall at any time when such fire shall happen be, in whole or in part, occupied for purposes considered hazardous, unless liberty so to occupy them be expressly stipulated for, this policy and every clause, article, and thing therein contained shall be void and of no effect." This proviso, the jury were instructed, clearly refers to *insured* premises, and not to premises containing personal property, which is the subject of the insurance. But is that the true meaning of the contract? A contract of insurance, like every other contract, is to be construed liberally and according to the intention of the parties. Angell on Fire Ins. §§ 12, 96.

The term "premises," both in law and in common parlance, is used to indicate lands or buildings. The "premises above mentioned," in this policy, must either mean the printing-press or the building in which the press was. No other premises had been mentioned. The parties could scarcely have intended to covenant that a printing-press should not be occupied, in whole or in part, for purposes considered hazardous. The "premises above mentioned" must then refer to the building in which the press was. The clause will then read, "provided that if the building above mentioned," or "the building in which the said press is," shall at any time when such fire shall happen be, in whole or in part, occupied for purposes considered hazardous, unless liberty so to occupy them be expressly stipulated for, this policy, and everything therein contained, shall be void and of no effect.

It can scarcely be contended that that is not a reasonable and fair contract for the parties to enter into. In most cases, the hazards of insuring personal property must depend, in a great degree, upon the building in which the insured property is, and upon the uses to which the building is applied. Increasing the hazard of the building increases the risk of insurance upon property within the building. This view was clearly within the contemplation of both parties to this contract. They describe the building in which the press is, not for the purpose of identifying the press, but for the purpose of ascertaining the hazard and determining the rate of insurance. When the press is removed to another building, the consent of the insurers to the removal is obtained and indorsed upon the policy. The hazard of the

Use of Premises. — Additions. — Increase of Risk.

building in which the insured property was located was an essential element of the contract. This cause was in fact tried upon the assumption that the hazardous purposes for which the building was used increased the risks of insurance, and thereby affected the liability of the insurers. Against that increase of risk, the insurers had a clear right to guard by their contract. They have done so, by the terms of their policy, in the most explicit language. Upon what principle is that clause to be stricken out of the contract? It is obvious that, upon the construction put upon the contract at the trial, the proviso is effectually erased from the policy. It has no meaning whatever. But the well settled rule of law is, that in interpreting contracts, effect must, if possible, be given to every clause.

If this insurance had been upon the building alone, it is not questioned but that the proviso would have been operative, and the policy would have been avoided by the use of the building for purposes extra hazardous. If the insurance had covered both the building and the press within it, still the proviso would be operative; and if the policy be avoided as to the building, it must be avoided, also, as to the property within it; because, by the express terms of the contract, "the policy, and every clause, article, and thing therein contained shall" thereupon "be void and of no effect." It is difficult to assign any good reason why the proviso is not equally operative when the insurance is upon the personal property alone.

The construction given to the sixth article of the deed of settlement, annexed to the policy, was clearly correct. That clause is, by its very terms, limited to alterations made in buildings insured by the company, and can, consequently, have no application except when the insurance is upon buildings. But there is no such limitation in the proviso contained in the policy, and its true meaning was mistaken upon the trial.

It is worthy of notice that the defendants, by their seventh and eighth pleas, plead the violation of the contract contained in the proviso, in bar of the action. The plaintiff does not demur, and thereby deny the validity of the contract, or its application to the plaintiff's cause of action, but takes issue upon the question of fact, whether the premises mentioned in the policy were occupied for purposes considered hazardous; and these issues of fact are by the jury found for the plaintiff.

Justices HAINES and VREDENBURGH concurred.

WILLIAM G. BAYLES vs. HILLSBOROUGH INSURANCE CO.¹
(Supreme Court, New Jersey, June Term, 1858.) *Action by Assignees. — Insurable Interest.*

An assignee of an insurance policy cannot maintain an action in his own name on the original covenant of insurance; the action must be brought on the new contract founded on the assignment, and to sustain an action of covenant, the assignment must be under seal.

An action cannot be sustained by the assignee against the company, unless he has an insurable interest in the property insured.

GRAHAM & BUCKINGHAM vs. FIREMEN'S INSURANCE CO.²
(Superior Court, Cincinnati, June Term, 1858.) *Insurable Interest. — Parol Evidence. — Reform of Policy.*

It is essential to a recovery upon a policy of insurance, that the party insured should have an interest in the property, both at the time when the insurance is made and when the loss happens. This interest need not be *personal*; it may be as *agent* or *trustee*, but it must exist in some form or other.

Where the terms of a policy are clear, they cannot be varied by proof, or explained by averment in pleading; if the terms are not clear, extrinsic evidence, consistent therewith, may be received to explain the policy.

Upon a showing of fraud or mistake, the insured will be entitled to have the agreement reformed and properly enforced.

JACOBS vs. THE EQUITABLE INSURANCE CO.³ (Queen's Bench, Upper Canada, Trinity Term, 1858.) *Other Insurance. — Practice.*

To an action on a policy of insurance, defendants pleaded an insurance by the plaintiff with another company, without notice to defendants, or indorsement thereof on their policy, contrary to one of the conditions. The plaintiff replied, on equitable grounds, that he effected the insurance with the defendants through N., their agent, residing at E.; that when he effected the second insurance in question he had not received the policy from defendants, and had no notice or knowledge of the said condition; that as soon as he became aware of it he gave notice to said N. that he effected the insurance mentioned in the plea, and another insurance with the B. A. Co., and as the insurance mentioned in the plea had been cancelled at the time of giving such notice, the said N. promised to have the insurance with the B. A. Co. indorsed on defendants' policy, and told the plaintiff that it was not necessary to have the other noted, and that defendants' policy would still bind them; that after said notice the defendants made a memorandum on their policy of the insurance with the B. A. Co., and returned said policy to the plaintiff as valid and subsisting; and defendants gave no notice to the plaintiff that they considered said policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of the defendants and not of the plaintiff; that at the time of the loss the plaintiff had no other insurance except that with the B. A. Co., and by reason of the premises, defendants waived the indorsement of the insurance mentioned in the plea.

It appeared that the policy was made at the head office in Montreal, on the 5th of June, and sent to N. about ten days before the fire, which took place on the 7th of July; but it remained with him, not being called for by the plaintiff. On the 16th the plaintiff obtained the policy pleaded, but it was cancelled on the 30th. N. was agent also for the

¹ 3 Dutcher, 163.

² 2 Disney, 255.

³ 17 Up. Can. Q. B. 35.

Other Insurance. — Practice.

B. A. Co., and granted to the plaintiff a policy with that company about the same time as the defendants'. On the 4th of July both those policies were sent to the respective head offices to have each marked on the other, and defendants' consent was noted on the 9th of July, and the policy returned. The agent knew of the policy pleaded before the fire, but not until after it had been cancelled. *Held*, that the replication was not proved, for the omission to note the policy was not owing to the negligence of defendants; they were not aware of it while it existed, and it would have been useless to note it after it had ceased.

Held, also, that the agent could not have waived the forfeiture.

Held, also, that the replication should not have been admitted, and might be struck out under the C. L. P. A., sec. 290.

JACOBS vs. THE EQUITABLE INSURANCE CO.

(18 Up. Can. Q. B. 14.)

To an action on a policy of insurance, defendants pleaded an insurance by the plaintiff with another company, without notice to the defendants or indorsements thereof on their policy, contrary to one of the conditions. The plaintiff replied, on equitable grounds, that he effected the insurance with the defendants through N., their agent, residing at E.; that when he effected the second insurance complained of he had not received the policy from defendants, and had no notice or knowledge of the said condition; that as soon as he became aware of it, he gave notice to said N. that he had effected the insurance mentioned in the plea, and another insurance with the B. A. Co.; and as the insurance mentioned in the plea had been cancelled at the time of giving such notice, the said N. promised to have the insurance with the B. A. Co. indorsed on defendants' policy, and told the plaintiff that it was not necessary to have the other noted, and that defendants' policy would still bind them; that after said notice the defendants made a memorandum on their policy of the insurance with the B. A. Co., and returned

said policy to the plaintiff as valid and subsisting; and defendants gave no notice to the plaintiff that they considered said policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of the defendants and not of the plaintiff; that at the time of the loss the plaintiff had no other insurance except that with the B. A. Co., and by reason of the premises defendants waived the indorsement of the insurance mentioned in the plea. *Held*, that the replication showed no equitable answer to the plea.

Quære, whether that objection was one for which it should be struck out under the C. L. P. A., sec. 290.

The court, however, ordered it to be struck out, on condition that the plaintiff should be allowed to reply otherwise.

The plaintiff was also allowed to amend his declaration, so as to show that the policy was to be subject to such conditions only as were contained in the printed applications for insurance on which it was granted, though the court intimated an opinion that such an amendment would be of no avail.

JACOBS vs. THE EQUITABLE INSURANCE CO.

(18 Up. Can. Q. B. 373.)

Declaration on a policy of insurance alleged that it was "subject to such conditions as are contained in the printed proposals issued by the said company," and that the plaintiff had kept all conditions precedent on his part, "according to the true intent and meaning of the said policy, and of such conditions as are contained in the printed proposals issued by the said company." Defendants

pleaded that the policy was "subject to such conditions as are printed on the back of said policy," and that among such conditions was one (setting it out) which the plaintiff had broken.

The plaintiff demurred, on the ground that the condition pleaded was not shown to be contained in the printed proposals. *Held*, that the plea was good.

Insurable Interest. — Husband's Interest in Wife's separate Estate, etc.

JACOBS vs. THE EQUITABLE INSURANCE CO.

(19 Up. Can. Q. B. 250.)

The jury having a second time found for the plaintiff, a new trial was granted without costs.

The only plea was a further insurance effected by the plaintiff, without notice to defendants or indorsement on their policy, on which issue was taken, and at the trial defendants admitted that if they should fail to prove their defence the plaintiff would be entitled to a verdict for the full amount insured. *Held*, per Robinson, C. J., that they were entitled to begin.

The further insurance having subsisted for fourteen days only before it was cancelled, it was argued that a reasonable

time must be allowed to give notice of it to the plaintiffs, and procure the indorsement, and that this was a question for the jury; but *held*, per Burns, J., that the question was not properly presented by the pleadings, and that the plaintiff having given no notice at all, though he had ample time to do it, the question of reasonable time could not arise.

It was contended also that the second insurance was void, owing to an omission by the plaintiff to comply with its conditions; but *held*, that it was nevertheless an insurance within the meaning of the condition in defendants' policy.

JACOBS vs. THE EQUITABLE INSURANCE CO.

(19 Up. Can. Q. B. 257.)

On a third trial of this case a verdict was found for the defendants, the learned judge having charged that the defendants had proved their plea, and not left it to the jury to say whether the plaintiff had

given notice to them of the further insurance within a reasonable time.

The court held the direction right, and refused a rule.

LAZARE vs. PHOENIX INSURANCE CO.¹ (Common Pleas, Upper Canada, Trinity Term, 1858.) *Evidence. — Fraud.*

Held, that sworn entries in the custom-house of the quantity and value of goods imported by the party claiming damages occasioned by fire under a policy of insurance, who claimed a much larger amount than appeared to have been imported during the period claimed for, were evidence to go to the jury as a measure of damages.

GOULSTONE vs. ROYAL INSURANCE CO.² (Nisi Prius, England, Trinity Term, 1858.) *Insurable Interest. — Husband's Interest in Wife's separate Estate. — Goods concealed from Creditors. — Proof of Value.*

A husband has an insurable interest in goods settled to his wife's separate estate, they residing together and sharing in the use of the property; and an insolvent retains an insurable interest in goods concealed from his creditors.

To prove the value of furniture in the possession of the insured at the time of the loss, a former insurance of his furniture, renewed and kept up by him, was received in evidence. But it appearing that the furniture had been sold under an execution, except the articles included in the settlement, and the policy dropped; and that afterwards the insured, becoming insolvent, stated in his schedule that he had no furniture except those articles, which he declared to be of the value of £50, his claim, in respect of the same

¹ 8 Up. Can. C. P. 136.

² 1 Fost. & F. 276.

Knowledge of Agent.

articles being upwards of £900; this was left to the jury as evidence on a plea that the claim was fraudulent. *Quære*, whether a fraudulent claim, the removal of articles of value before the fire, coupled with the fact that the fire broke out when no one was, or for two days and nights had been, in it, or had access to it, except the insured, who had the key, and who, it was proved, had at least once returned to the house during that time, would be evidence to sustain a plea of arson. *Semble*, that it would be so. Even where there is no fraud, the insured on a fire policy can only recover the real amount of the loss.

CAMPBELL vs. MERCHANTS' AND FARMERS' MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, New Hampshire, July Term, 1858.)

Knowledge of Agent.

The knowledge of an agent for insurance of the existence of a material fact not stated by the applicant, *held* to be the knowledge of the insurance company in a case where there was no fraudulent concealment of the fact.

THE case is sufficiently stated in the opinion.

EASTMAN, J. The case agreed upon by the parties shows no fraud in the plaintiff in effecting the insurance, but the application did not give a full description of the building in which the property insured was situated. It omitted to state that there was a small steam-engine in the building, which fact, according to the rules and regulations of the company, would have prohibited the issuing of a policy upon the building itself, and, by implication, upon the property therein.

This regulation or by-law, however, would not make void a policy issued by the directors in contravention of the by-laws, if the policy was not voidable upon other grounds. A by-law is not a limitation and restriction of the power which is lodged by the charter of a company in the board of directors; and it can have no higher effect in this respect than instructions, or general regulations adopted by the directors themselves, as a convenient guide in ordinary cases. *Union Mutual Fire Ins. Co. v. Keyser*, 32 N. H. 313.

This policy, then, cannot be avoided unless it be upon the ground that the application which, according to the terms of the policy, forms a part of the contract of insurance, did not set forth all the facts and circumstances material to the risk. It is a general rule that whatever is material to the risk must be correctly set forth in the application, if it forms a part of the policy; otherwise the policy will be void. *Carpenter v. American Ins. Co.*

¹ 37 N. H. 41.

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1 Story, 57; *Fowler v. Aetna Ins. Co.* 6 Cowen, 673; ¹ *Davenport v. New England Co.* 6 Cushing, 340.²

But in *Marshall v. The Columbian Mut. Fire Ins. Co.* 27 N. H. (7 Foster) 157, it was held that where the application is taken by an agent of the company, and he is aware of facts material to the risk, but which are not set forth in the application, the company will be charged with knowledge; and that, under such circumstances, an unintentional concealment or misrepresentation will not make void the policy. The same principle was alluded to in *Leathers v. Farmers' Mut. Fire Ins. Co.* 24 N. H. (4 Foster) 262.³ As, however, the point has not been very fully considered by the courts of this state, and the counsel for the defendants have cited several cases of high authority sustaining a different doctrine, we have thought it proper to examine the question at some length, with a view to test the accuracy of the position.

So far as the insurance companies in this state are to be considered, the legislature have settled the principle by enacting that applications taken by the agents of the companies shall not be void by reason of any error, mistake, or misrepresentation, unless it shall appear to have been intentionally and fraudulently made. Laws of 1855, chap. 1662, sec. 6. But that act does not apply to corporations established by the laws of other states, and consequently not to this case.

Contracts of insurance are believed to be of recent origin, when compared with many other contracts known to the law. The first allusion to the subject is said to have been made in the latter part of the fourteenth century, in the laws of Wisburg, compiled in the Teutonic language. The first English case that I have found was decided in 31 of Elizabeth, cited in 6 Coke, 47. Between that time and up to 1756, Park, in his system of the law of marine insurance, says, that not forty cases upon the subject were to be found in the English books. After this the decisions in England assumed a new spirit and vigor, so that Chancellor Kent says that there is no branch of the law that has been more thoroughly investigated than that of marine insurance, and that it is by far the most extensive and complex title in the commercial code. 3 Kent's Com. 342.

Great strictness has always been held in contracts of marine

¹ *Ante*, vol. 1, p. 179.

² *Ante*, vol. 3, p. 129.

³ *Ib.* p. 286.

Knowledge of Agent.

insurance. A misrepresentation or concealment of any fact material to the risk, even though it happen through mistake or accident, and though the loss arises from a cause unconnected with such misrepresentation, will make void the policy. Park on Insurance, 249, 6th ed.; 3 Burr. 1905; *Fitzherbert v. Mather*, 1 T. R. 12; *McDowell v. Frazer*, Doug. 260; *Bridges v. Hunter*, 1 Maule & Selw. 15.

A breach of a warranty avoids a contract *ab initio*; and it makes no difference whether the thing warranted be material or not, or whether the loss happened by reason of a breach of the warranty or not. A warranty differs from a representation in this respect, that it is in the nature of a condition precedent, and requires a strict and literal performance; but all express warranties must appear upon the face of the policy. 3 Kent's Com. 288. There may also be implied warranties, such as necessarily result from the nature of the contract; and in every policy it is implied that the ship is sea-worthy when the policy attaches. *Law v. Hollingworth*, 7 T. R. 160; *Silva v. Low*, 1 Johns. Cases, 184.

I apprehend that from this strictness existing in the law of marine insurance have been drawn the rigid rules laid down by many tribunals upon fire insurance policies, and that the authorities in cases of marine insurance have been followed in actions upon policies against fire, without perhaps sufficiently advertent to the difference that exists in the knowledge of facts upon which the respective contracts are founded. Kent says that the strictness and nicety required in the contract of marine insurance do not so strongly apply to insurance against fire, for the risk is generally assumed upon actual examination of the subject by skilful agents on the part of the insurance offices. 3 Kent's Com. 373.

The severity of these rules has caused courts in many instances to endeavor to avoid their effect. Thus Lord Mansfield, in *Pawson v. Watson*, Cowper, 785, says that it is the opinion of the court that to make written instructions valid and binding, they must be *inserted* (not referred to) in the policy. And Sutherland, J., in *Jefferson Ins. Co. v. Cotheal*, 7 Wendell, 80,¹ also says, that the doctrine of warranty in the law of insurance is one of great rigor, and frequently operates very harshly upon the assured. And again, after discussing an application not embraced in the policy, and holding that it shall not be considered a warranty, he

says: "I am not disposed to lead the way in the extension of this harsh and rigorous doctrine."

And there are authorities which hold that where inquiries are not put by the company or its agents, as to the title and situation of the property, and no fraud appears, a suppression of facts will not make void the policy. *Strong v. Manufacturers' Ins. Co.* 10 Pick. 40 ;¹ *Fletcher v. Com. Ins. Co.* 18 Pick. 419 ;² *Niblo v. North American Fire Ins. Co.* 1 Sand. 551.³

The books abound in cases as to what are and what are not necessary disclosures, and as to what shall be held representations and what warranties; and the authorities not unfrequently seem confused and contradictory, arising from the different construction which is put upon the applications for insurance and the effect that is given to them. And there appears to be a manifest disposition in some tribunals, which hold the rules with strictness, to bring as few cases as possible within their range.

The business of insurance against fire has greatly increased by the incorporation and establishment of mutual companies, and the mode of transacting the business, as well as the property insured, differs very essentially from that of marine insurance. The method of doing the business in these companies also varies materially, in some respects, from that which prevails in stock companies, as they are usually termed. And were the courts now, for the first time, to lay down, without regard to authority, the rules of law that should govern contracts made between mutual companies and their members, I apprehend that in many jurisdictions they would differ essentially from the rules which at present prevail.

As a general practice, these companies require all applications for insurance to be in writing, and they make the application a part of the policy. As a general practice, also, they send out agents appointed by themselves, who are oftentimes directors of the companies, who examine the buildings and make the surveys, and make out the applications for the insured to sign. Now, aside from authority, upon what principle of right can it be said that in regard to facts which are obvious and known to the agent and company, but which are unintentionally not communicated, a different rule of law should prevail from that which exists in the sales of property? Why should it be held that the unintentional

¹ *Ante*, vol. 1, p. 326.

² *Ib.* p. 556.

³ *Ante*, vol. 2, p. 666.

tional neglect to state facts in an application for insurance, which are perfectly obvious and well known to the officers of the company, shall defeat the contract and make void the policy, while the sale of property made upon a warranty is not to be affected by any defects which are obvious to the senses? I entirely agree with the court in *Jennings v. The Chenango County Mutual Ins. Co.* 2 Denio, 79,¹ when they say that it would be difficult to assign a satisfactory reason for a distinction in this respect. Why should not an insurance company be estopped from setting up defects in an application, which are known to them, as well as the owner of property who knowingly stands by and sees the property sold by a third person, without disclosing his title, be afterwards estopped from setting up that title? It appears to me that the fraud in the former case is quite equal to that in the latter.

I am aware that there are many cases, and of high authority, which lay down the rule the other way, and hold, that, when the application is made a part of the policy, statements contained in it are warranties, and if untrue, the policy is void, even though the variance be not material to the risk.

The same authorities also hold that the rule which prevails upon sales of property, that the warranty does not extend to defects which are known to the purchasers does not apply to warranties contained in contracts of insurance. And such is the doctrine of *Jennings v. The Chenango County Mutual Ins. Co.* 2 Denio, 75, already cited, and which is an authority in point for the defendants. The authorities are examined at length in that case, and the conclusion arrived at that they show the policy to be void. In closing the opinion, however, the court say: "At the same time, it cannot be denied that the application of these principles to the case under consideration operates with great severity upon the plaintiff, and is well calculated to lead to serious doubt whether the intention of the parties and the interests of justice were duly regarded in the establishment of the rule." And they then add: "Here the mistake was proved to have been the consequence, either of the ignorance, carelessness, or bad faith of the agent of the defendants. He filled up a printed blank application, furnished by the defendants, to be subscribed by the plaintiff, who probably neither had nor pretended to have any in-

¹ *Ante*, vol. 2, p. 437.

Knowledge of Agent.

formation or knowledge of what such a paper ought to contain in order to render the policy available, but relied in that respect implicitly upon the agent sent out by the defendants." The defects in that application were, that the building was occupied for a further purpose than that stated in the application, and also that the surrounding buildings were not correctly given. These facts were known to the agent, who said that the risk was not increased, and that it was of no use to put them into the application. Still the court felt themselves bound by the authorities, and held that the application, taken in connection with the conditions of the policy, was a warranty, and that the policy was void.

The evident harshness and severity of this doctrine, so well shown by the court in the last case cited, has since led to a different result in some cases in the same state.

In *Masters v. The Madison County Mutual Ins. Co.* 11 Barb. Sup. Ct. 624,¹ the agent of the company, on being applied to for an insurance upon the plaintiff's mill, went to see the property, and made a survey of the same, the plaintiff not accompanying him, but leaving him to transact the business, and do whatever was necessary. The agent then made out the application for the plaintiff to sign, using the printed blank furnished to agents for that purpose. He was informed at the time by the plaintiff's son that there was a mortgage on the premises, which was a lien thereon; but the application made no mention of any incumbrance. It was held that the notice given to the agent of the incumbrance was a sufficient notice to the company, and that the omission to set forth the mortgage in the application was not a breach of warranty, or a concealment of important matters affecting the risk, notwithstanding the application, by a memorandum in the margin, required the applicant to state whether the property was incumbered, by what, and to what amount, and if not, to state it; and although the by-laws of the company made the person taking the application the agent of the applicant; and further, that notwithstanding such by-law, he was still the agent of the company, and that they were bound by his acts. See also *New York Central Ins. Co. v. National Ins. Co.* 20 Barbour, 468.

Kent says that the decisions contain strict doctrines on the subject of concealment; but he adds that the insured is not bound to communicate any facts which the underwriter may be presumed to know equally with himself. 3 Kent's Com. 285.

¹ *Ante*, vol. 3, p. 398.

Knowledge of Agent.

We would not relax any of the sound and wholesome rules which require integrity and good faith on the part of the insured, and would hold them to as strict a compliance with their contracts as we would the companies; but upon a reëxamination of the question, we think that the rule laid down in *Marshall v. The Columbian Mutual Fire Insurance Co.*¹ contains the just and true doctrine.

The applicant, unused to the business of making applications, and ignorant of what is necessary to be done, trusts to the skill, knowledge, and judgment of the agent to fill up the application, which is usually a blank, by giving all the information that is required by the company. He puts full confidence in the agent, and relies upon him to see that the business is done correctly, and the application made out according to the requirements of the company; and if he acts honestly and in good faith, the company ought to be charged with a knowledge of all the facts that are known to the agent. It would be unjust to the insured, after he has made such an application, paid the premium demanded, the expenses of the policy, and the assessments as they are made, to permit the company, upon the destruction of the property, to say that they will not make good the loss, because their agent, whom they have authorized to act for them and make their application, has failed to make it sufficiently full.

There are many facts which the agent may know quite as well as the applicant. Upon an application and survey of a building, if personally made by himself, he will ordinarily become possessed of all the material facts in this respect. The title to the property he does not investigate, and of course relies upon the statements of the applicants. He knows the requirements of the company, and the details that should be set forth in the application, while the insured is in most cases entirely ignorant of these matters; and if the application is unintentionally defective, upon a point well known to the agent, the company and not the insured should be the sufferers. The agents are, to this extent, and for the purpose of taking the applications, the officers of the company.

The facts in the present case appear to come distinctly within the rule which we have endeavored to explain, and which, we think, should prevail; and we are therefore of opinion that, according to the agreement of the parties, there should be

Judgment for the plaintiff.

¹ *Ante*, vol. 3, p. 634.

WILLIAM NOYES, JR., *vs.* WASHINGTON COUNTY MUTUAL Insurance Company.¹ (Supreme Court, Vermont, August, 1858.)

Proof of Loss. — Waiver.

Notwithstanding the conditions of a fire insurance policy require the insured to furnish the insurers with a notice and sworn proof of the loss within a specified time after its occurrence, still, if the insurers make no objection to the want of that particular form of proof, but proceed to reject the claim of the insured wholly upon other grounds, they will be regarded as thereby waiving a compliance with the requirements of the policy in that respect.

SOMERS *vs.* ATHENÆUM FIRE ASSURANCE Co.² (Superior Court, Montreal, September, 1858.) *Mistake of Agent. — Misrepresentation. — Practice.*

The error of an insurance company's agent in making and transmitting to the head-office a diagram of the buildings insured, by means of which the buildings are described in the policy as "detached" instead of as "connected with other buildings," cannot deprive the assured of his remedy on the policy.

That to a plea setting up that the policy was obtained by false and fraudulent misrepresentations, as to the building being "detached," and as to the number of occupants, and that thereby the conditions of the policy were broken, and the plaintiff deprived of all benefit under it, the plaintiff is entitled to answer, denying such misrepresentations, and alleging the visits of the assurance company's agent to the insured premises, and his doings as to the making and transmitting of an erroneous diagram.

GEORGE A. KIBBE & others *vs.* HAMILTON MUTUAL INSURANCE Co.³

(Supreme Court, Massachusetts, September Term, 1858.)

Title. — Non-disclosure.

An application made to a mutual insurance company, in a printed form issued by them, by one of their agents, without knowledge of the person to be insured, for insurance on a building, stated that "the property to be insured" belonged to him; when in fact he owned the building only, and was a mere tenant at will of the land on which it stood. A policy was issued thereon, expressly made subject to the lien of the company on the interest of the assured in any personal property or buildings insured and the land under such buildings, upon which lien the company expressed their intention to rely; and to the by-laws, the conditions of which were declared to be part of the policy; and provided that the application should be a part of the policy and warranty on the part of the assured, that any policy should be void "unless the true title and interest of the insured be expressed in the proposal or application;" that "property held by lease, or standing on land so held, shall not be insured, unless specially described as such in the application;" that "in case the application is made through an agent, the applicant shall be held liable for the representation," and that "no insurance agent or broker forwarding applications to this office is authorized to bind the company in any case whatever." *Held*, that the assured by accepting the policy adopted the representations of the agent; that the failure to specify the nature of his interest avoided the policy; and that parol evidence of the agent's knowledge of the actual facts is inadmissible.

¹ 30 Vermont, 659

² 9 L. Can. R. 61.

³ 11 Gray, 163.

ACTION of contract upon a policy of insurance for \$1,400 upon a building in Springfield, made by the defendants to Robert G. Marsh, and by him assigned with their consent to the plaintiffs.

The policy was declared by printed clauses on its face to be made "under the provisions, conditions, and limitations of the charter and by-laws of said company," and subject to the lien on the interest of the person insured in any personal property or in any buildings covered by this policy, and the land under said buildings" (upon which lien the company therein expressed their intention to rely), and to be "accepted by the insured, subject at all times to the conditions and regulations of the act of incorporation and by-laws of said company for the time being in force, which conditions and regulations are hereby declared to form a part hereof." The by-laws contained these provisions : —

Art. 6. "The application on which a policy is founded shall be held to be a warranty on the part of the insured, and as absolutely a part of the policy and of the contract of insurance as if it were actually incorporated therein in full."

Art. 12. "Any policy issued by this company shall be void, unless the true title and interest of the assured be expressed in the proposal or application for insurance, and unless all incumbrances and the amount and nature thereof be therein disclosed. The interest of a person who is the mere purchaser or holder of an equity of redemption is not insurable; but the interest of a mortgagor or mortgagee may be insured as such, the true state of the title being expressed. Property held by lease, or standing upon land so held, or improvements on the same, or property contained in buildings so standing, shall not be insured unless specially described as such in the application."

Art. 13. "Unless the applicant for insurance shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, or the value of the property, the policy issued thereon shall be void; and in case the application is made through an agent, the applicant shall be held liable for the representation. No insurance agent or broker forwarding applications to this office is authorized to bind the company in any case whatever."

The application contained numerous printed questions and written answers, among which were these : "1. Whose is the

property to be insured, and where situated?" Answer. "Robert G. Marsh, Railroad Street, Springfield, Mass." "14. If the property is incumbered, state for how much and to whom. State the true title and interest." Answer. "Mortgaged with other property to the party to whom the policy is made payable." Also this clause: "The applicant further agrees that the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss; and that the company shall not be bound by any act done or statement made to or by any agent or others, not contained in this application." The application was signed "Robert G. Marsh, by R. E. Ladd."

The case was submitted to the decision of the court upon the policy and application and the following statement:—

Marsh was the owner of the building, but was not the owner of the land upon which it stood, and had no written lease of the land, but paid an annual rent to the owners thereof.

The defendants had duly appointed R. E. Ladd, of Springfield, their agent, with proper instructions to receive and solicit applications for insurance, to forward them to the defendants' office at Salem (where they were to be approved, the rate fixed, and a contract made or refused), to receive the policy from the defendants, if issued, deliver it to the applicant, and receive from him the cash premium, and had furnished Ladd with the usual blanks for that purpose. But Marsh had no knowledge of the instructions and authority of Ladd, further than is to be legally presumed from receiving the policy with the by-laws attached.

The plaintiffs can prove the following facts, if admissible: This property had been previously insured in another company, for which Ladd also acted, by a policy about to expire, and Ladd, knowing that Marsh was desirous of procuring a policy in another company, prepared this application and forwarded it to the defendants, and received back this policy, and notified Marsh that he had such a policy for him. Marsh, meanwhile, not knowing that the application had been made or was to be made to the defendants, had made arrangements for insuring the property in another office, which arrangements, upon receiving notice from Ladd that he already had the policy in suit for him, he abandoned, and received this policy from Ladd. Marsh never saw the contents of this application, and never was informed thereof, nor that any written application had been made to the defendants for the policy, except by the statements contained in the policy

and by-laws. Ladd well knew the condition of the title and interest of Marsh, but either considered it unimportant, or supposed that the description given implied only the ownership of the buildings.

METCALF, J. It has been decided so many times as to have become common learning, that when a policy of insurance is made subject to the provisions and conditions of the underwriters' charter and by-laws, those provisions and conditions are legally a part of the contract of insurance, to the same effect as if they were set forth at large in the policy. The policy in this case not only insures Marsh generally, "under the provisions, conditions, and limitations of the charter and by-laws" of the defendants, but also specially declares that the conditions and regulations of that charter and those by-laws form a part of the policy, and that the policy is accepted by the insured, subject to those conditions and regulations.

The twelfth article of the defendants' by-laws provides that "any policy shall be void, unless the true title and interest of the assured be expressed in the proposal or application for insurance;" and that "property held by lease, or standing upon land so held, shall not be insured unless specially described as such in the application." When this policy was made, Marsh held the tenements, which are therein described, under an oral lease, as tenant at will. Yet in his application he did not specially describe them as so held, but merely stated them to be his property. The policy states that the defendants relied on the lien given them by the law, upon the interest of the person insured in any buildings covered by the policy, and the land under those buildings. But the defendants could not have any lien at all on the land under the buildings, nor a lien of any value on the buildings.

It is argued for the plaintiffs, that Marsh is not bound by Ladd's representations to the defendants. But we cannot doubt that Marsh, by accepting the policy, adopted Ladd as his agent, and the representations of Ladd as if made by himself personally.

We cannot perceive any ground for the suggestion that the defendants waived, in this case, a compliance with the twelfth article of their by-laws. And the parol evidence, which it is agreed the plaintiffs could adduce, would not be admissible to vary the legal effect of the terms of the policy. *Jenkins v. Quincy Mutual Fire Ins. Co.* 7 Gray, 370.¹ *Judgment for the defendants.*

¹ *Ante*, p. 150.

Arbitration. — Limitation Clause.

TOWNSEND vs. NORTHWESTERN INSURANCE CO.¹ (Court of Appeals, New York, September, 1858.) *Repairs.*

The making of repairs upon a building insured is not within the ordinary prohibition against an increase of the risk.

The removal of an old wooden bulk-head and the substitution of a stone one in its place, held not an alteration of the building; and the doing this within a reasonable time does not avoid the policy, though a pump was thereby disabled for several days, and though repairs could have been made more expeditiously in another way.

THOMAS BROWN vs. ROGER WILLIAMS INSURANCE CO.
THOMAS BROWN vs. HARTFORD INSURANCE CO.² (Supreme Court, Rhode Island, September Term, 1858.) *Arbitration. — Limitation Clause.*

A policy of fire insurance effected by the owner and mortgagor of a stock of goods, by the terms of which the loss or damage, if any, is made payable to the mortgagee, is, in legal effect, assigned by the former to the latter, with the consent of the insurer, as collateral security for the mortgage debt; and, independently of any special clause in the policy enabling him, the mortgagor and the insurer cannot, the mortgage being unpaid, without the authority or consent of the mortgagee, submit, in case of loss, the amount of the same to arbitrators, so as to make their award binding upon the mortgagee.

The usual limitation clause held valid.

THOMAS BROWN vs. ROGER WILLIAMS INSURANCE CO. THOMAS BROWN vs. HARTFORD INSURANCE CO. (7 R. I. 301.)

To a declaration on a policy of fire insurance to recover a loss, the plea alleged that the policy expressly provided, "that no suit or action of any kind against the defendant for the recovery of any claim upon, under, or by virtue of the policy, should be sustainable in any court of law or chancery, unless such suit or action should be commenced within the term of twelve months next after the cause of action should accrue; and in case any such suit or action should be commenced against the defendant after the expiration of twelve months next after the cause of action should have accrued, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim so attempted to be enforced; and that the plaintiff did not commence his action against the defendant within twelve months next after his cause of action accrued to him." To this plea the plaintiff replied, "that within twelve months next after his said

cause of action accrued to him, he commenced his certain suit or action for the recovery of his loss or damage by him sustained, in consequence of the non-performance by the said defendant of the said several promises and undertakings in said declaration mentioned, in the names of Bourn and Brown, trustees to this plaintiff, to wit, at the March term of this court, A. D. 1856; which said suit was by the defendant, under the act of Congress in such case made and provided, removed into the circuit court of the United States for the district of Rhode Island, at the June term thereof, A. D. 1856; and at said term the defendant pleaded that the subject matter of said suit had been settled by an award of arbitrators, and that the defendant never promised as in the declaration in said case was alleged; and upon issue joined upon said plea a verdict was rendered for the plaintiff, and judgment was arrested in said cause upon the motion of the de-

¹ 18 N. Y. 168.² 5 R. I. 394.

Construction of Policy. — Alteration.

fendant, notwithstanding such verdict. And the plaintiff avers, that the said suit was commenced by himself and for his benefit, and was for the same cause of action for which this suit or action is brought and pending; and that he commenced this action as soon as he reasonably could after the judgment was arrested in said suit in the name of Bourn and Brown, trustees as aforesaid, in said circuit court of the United States."

Held, upon general demurrer to this replication, that it was no answer to the plea, because this suit was no continuation of the suit in the circuit court; nor did it appear from the pleadings that the clause of limitation in the policy was qualified, in case of arrest of judgment, as the general limitation was by the fourth section of the statute of James, and the eighth section of the Rhode Isl- and general statute of limitations.

EDDY STREET IRON FOUNDRY vs. FARMERS' MUTUAL FIRE INSURANCE Co.¹

(Supreme Court, Rhode Island, September Term, 1858.)

Construction of Policy. — Alteration.

A renewal policy, issued to an iron foundry company, describing their property insured, consisting of stock, tools, fixtures, cupola, flasks, and patterns, as "situate in the rear of 82 and 84 Eddy Street," construed not to confine the insurance to such property contained in the furnace building of the company, although the application for the original policy did so confine it; the change in the description of the locality of the property to be insured having been made in the renewal policy, at the express request of the insured in their application for it, and being necessary to adapt the policy to the actual situation of a portion of the insured property, when placed, as usual, in the safe and convenient mode of conducting such business.

Such change also held, for the purpose of testing whether an answer of the insured, in the renewal application, "that there had been no alteration in or about the property to be insured material to the risk since the last application," was false, to be a change of *the policy*, and not an alteration in *or about the property insured*.

The renewal policy, thus changed, and, in addition, omitting one subject of the original insurance, — a steam-engine, — and distributing the amount to be insured differently amongst the remaining subjects of insurance, *held*, also, not to adopt the statement of the value of those subjects as stated in the application for the original policy.

ASSUMPSIT to recover for a loss under a fire policy, effected by the plaintiffs, a manufacturing corporation, with the defendants, by which the latter had insured the former against loss or damage by fire: —

On stock, raw, wrought, and in process	\$150.00
“ tools and flasks	750.00
“ fixtures, cupola, and patterns	600.00

In the whole, . . . \$1,500.00

The cause was tried at the present term, before the chief justice, sitting with a jury; and on the trial it appeared, that in the latter part of 1853, the firm of Hawes & Stanley, then carry-

¹ 5 R. I. 426.

Construction of Policy. — Alteration.

ing on the iron foundry business at the same place with the plaintiffs, effected a like amount of insurance with the defendants, distributed as follows : —

On stock, manufactured, unmanufactured, and in process,	\$150.00
“ tools, flasks, machinery, fixtures, and cupola, .	750.00
“ patterns and steam-engine	600.00

In the whole, . . . \$1,500.00

That in their application for this policy, being No. 281, they represented the value of their *stock* to be \$400; of their tools, flasks, &c., to be \$2,500; and of their patterns and steam-engine to be \$2,000; and that on a plan or diagram, on the back of the application, representing the situation of the premises in which the subjects of insurance were contained, — the body of the application stating them to be situated “on Eddy Street, Providence, southerly side,” — was drawn, amongst others, a square, with these words written upon it, “Furnace, containing property to be insured.” This policy being about to expire, on the 30th of December, 1854, the same firm applied to the defendants for a renewal, and, in their application for it, appended to the ordinary printed form for a renewal application at the defendants’ office, a piece of paper, bearing on it this request : —

“Let the policy read, \$150 on stock, raw, wrought, and in process; \$750 on tools and flasks; \$600 on fixtures, cupola, and patterns. Situate in rear of 82 and 84 Eddy Street, Providence. With liberty for other insurance (not exceeding three fourths of the value of said property) without notice till requested.”

In answer to the question in the application for this policy, — “Have any alterations been made in or about the property insured, since your last application, materially affecting the risk? If so, state what,” — the answer of Hawes & Stanley was, “Boiler and steam-engine have been removed.” The second policy of Hawes & Stanley with the defendants, being No. 412, was issued, conforming, both in the distribution of the sum insured upon the different subjects of insurance and in the description of the place in which these subjects were situated, to the above request appended to the application for it.

Upon the expiry of this policy — Hawes & Stanley having in the mean time been incorporated by the name of the “Eddy Street Iron Foundry of Providence” — application was made by

Construction of Policy. — Alteration.

the corporation, through Hawes, their treasurer, for a renewal of the policy No. 412, issued by the defendants to Hawes & Stanley,—the application stating the incorporation of the plaintiffs, and also stating that no alteration had been made in or about the property insured, material to the risk, since the date of the last application. Upon this application, the policy in suit, No. 619, was issued, conforming in all respects to No. 412, except that it was issued to “The Eddy Street Iron Foundry of Providence,” instead of, as No. 412, to Hawes & Stanley. The defendants were a mutual insurance company, and their policies limited their insurance to three fourths of the value of the property contained in the application of the insured. The printed rules and regulations of the company, appended to their policies, stated, as amongst the “matters which will vacate a policy,” — “or if there shall be an enlargement, alteration, or addition to the premises, of a character increasing the risk,” — “or, if the state of things in or about the buildings insured be so altered, or changed, by the advice, consent, or procurement of the assured, as to cause a material increase of risk,” — as well as unfair representations or concealment of facts material to the risk. The loss by fire took place in January, 1856, and was confined to property contained in a storehouse on the premises of the plaintiffs in the rear of 82 Eddy Street, and not in the furnace building; the property, consisting of flasks and patterns, being stored for use. It was in proof that this species of property was not usually, and could not be conveniently or safely kept in the furnace building, except when in immediate use; but was at other times stored or deposited elsewhere, to be out of the way and safe from injury. The “furnace” of the plaintiffs was directly in the rear of No. 82 Eddy Street. The whole premises occupied by them as iron foundry were well described as in the rear of Nos. 82 and 84 Eddy Street. Upon these facts the defendants requested the judge presiding at the trial to instruct the jury, that the loss was not within the policy, which, construed in connection with the original policy No. 281, and the renewal policy No. 412, and their respective applications, confined the insurance to property contained in the furnace building, and did not embrace property contained in the storehouse burnt, although situated upon the premises of the plaintiffs in the rear of Nos. 82 and 84 Eddy Street, Providence. The judge refused

to give this instruction, but did instruct the jury, especially if they found that property of the kind injured or destroyed was not usually, and could not be safely and conveniently kept when not wanted for immediate use, in the furnace building, to construe the policy — taking it in connection with the renewal application and policy No. 412 — as embracing all property of the plaintiffs, of the kind injured, situated on their premises in the rear of Nos. 82 and 84 Eddy Street, Providence; and in view of the answer of Hawes & Stanley to the question in that application, “that there had been no alteration in or about the property material to the risk since the date of their last application,” and that all facts might be found which the full court might deem material to the case, also directed the jury specially to find, “if it was material to the risk, whether the property, described in the policy as the subject of insurance, was kept in the furnace building, or was kept, at the option of the plaintiffs, partly in the furnace building, and partly outside said building, and partly in the buildings in the rear of Nos. 82 and 84 Eddy Street, occupied by the plaintiffs.”

The counsel for the defendants having also argued to the jury, from a comparison of the value of the property of the kind insured, as stated in the application of Hawes & Stanley for the original policy No. 281, with that stated in the preliminary proofs of loss under the policy sued, that the latter either grossly exaggerated the value of the property lost, or that it was evident, from the large increase of the value of the property of this kind at the time of the loss, that the application for policy No. 281, which, as to value, was adopted by the application for the renewal policy No. 619, contained a misrepresentation of the value at the time of effecting the policy sued, material to the risk, — the presiding judge instructed the jury, “that the statement in the application for policy No. 281, as to the value of the property then to be insured, taken in connection with the statements in the applications for the policies 412 and 619, as to there having been no alteration in or about the property insured materially affecting the risk since the last application, was not to be used as an admission or statement of the plaintiffs as to the value of the property upon which insurance was effected by policy No. 619.”

Under these instructions, the jury returned a verdict for the plaintiffs for the sum of \$1,348.28, the value of the property lost,

not exceeding three fourths of the value of the property described in the plaintiffs' application, and also specially found, "that it was not material to the risk, in said case, whether the property described in the policy as the subject of insurance, was kept in the furnace building, or whether it was kept partly in the furnace building and partly outside of said building, and partly in other buildings in the rear of Nos. 82 and 84 Eddy Street, occupied by said plaintiffs, at the option of the insured."

The defendants now moved for a new trial, alleging that the above instructions were erroneous.

AMES, C. J. We are all satisfied that neither of the causes alleged by the defendants in their motion afford them ground for a new trial. Granting that policy No. 281, effected by Hawes & Stanley with the defendants, by reference to the plan on the back of the application, described the property to be insured as all contained in the furnace building, yet the application for the renewal policy No. 412, expressly requests that the policy should read, as when issued it did read, as to the locality of the property, "situate in the rear of 82 and 84 Eddy Street, Providence," — a description far more inclusive, and covering, as we construe it, the whole premises occupied by the plaintiffs in their business as iron founders. The rear of the two numbers just mentioned covered those premises, whereas the furnace building was properly in the rear of only one of them. Besides, some of the things insured — as stock, patterns, and flasks — must, from the necessities of the business, and would most safely be, in great part, and so far as not wanted for immediate use, elsewhere than in the furnace room; and construing the above change of the language of the renewed policy, as applied to the necessary locality of the subjects of insurance, we cannot doubt that it was the understanding of both parties to the contract, that this wider range for the locality of the property should be allowed to the insured, and should describe the property included within the risk. It is true, that when asked, in the application for policy No. 412, "Have any alterations been made, in or about the property insured, since your last application, materially affecting the risk? If so, state what," the insurers reply nothing concerning any change of locality, but merely "boiler and steam-engine have been removed." There probably had been, in fact, no change in the actual locality of the property, belonging to the insured, of the kind mentioned,

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since the date of their last policy ; the change being rather in the policy itself, to make it cover all of their property of this kind, wherever it might chance to be on their premises, according to the necessities or conveniences of their business ; instead of confining the risk, as in the last policy, to such property in the furnace building. This, too, is a full answer to the objection, that the greater inclusiveness of the renewed policy, by materially increasing the risk, falsified the answer to the question in the renewal application relating to a change with that effect in or about the property insured ; the change being, not in the property, but in the policy itself. But, if this were not so, to save all question on this head, the jury have specially found, that it was not material to the risk, whether the property insured was kept in the furnace building, or, at the option of the plaintiffs, partly in that building and partly outside of said building, and partly in other buildings, in the rear of Nos. 82 and 84 Eddy Street, occupied by the plaintiffs. The policy sued, No. 619, issued to the plaintiffs, is in renewal of policy No. 412, issued to Hawes & Stanley ; they having, in the mean time, been incorporated by the name of "The Eddy Street Iron Foundry." It pursues the same language, describing the locality of the property to be insured in the same words as the next preceding policy, and is free from all suspicion, looking at the answer of the insured to the above question as to change in or about the property to be insured ; inasmuch, as it is not pretended that there was any change, either of property or policy, materially affecting the risk or otherwise, "since the date of the last application."

The other cause for a new trial, alleged in the motion, that the presiding judge excluded the statement in policy No. 281, as to the value of the property by that policy insured, as evidence of the value of the property insured upon the second renewal policy, No. 619, upon which the action was brought, is equally groundless as such cause. As we have seen, the two latter policies were changed, as to the description of the locality of the property to be insured, for the express purpose of covering more property than was kept in the furnace building. Between the dates of the first policy and of the first of the two last, the engine and boiler had been removed, and ceased to form a part of the property insured. Accordingly, the same amount of insurance, \$1,500, was distributed differently between the subjects of

Other Insurance. — What Policy covers. — Preliminary Proofs. — Application, etc.

insurance in the two last policies, from what it had been in the first. Thus, in policy No. 281, the amount insured on "tools, flasks, machinery, fixtures, and cupola," was \$750; whereas, in the two last policies, this amount was insured on "tools and flasks" alone. In the first, \$600 was insured on "patterns and steam-engine;" whereas, in the two last, the same amount was insured on "fixtures, cupola, and patterns." This change of distribution points to change in the value of the different subjects of insurance, if, indeed, this latter change were not necessarily to be implied from the nature of the plaintiffs' business, and of the subjects of their insurance. Under such circumstances, how can it be imagined that the plaintiffs adopted, or were supposed by the defendants to adopt, in the policy sued, which contains no statement of the value of the property insured, the statement of values given in policy No. 281, effected by Hawes & Stanley two years before? — the same values to be applied to different property, and described, that the policy might embrace more property, as situated anywhere on the premises of the plaintiffs in the rear of Nos. 82 and 84 Eddy Street, and not confined in locality, as under the original policy, to their furnace building? It is plain, therefore, that the plaintiffs did not adopt, and could not have been supposed by the defendants to have adopted, in their renewal policy, now sued, the statement of values in the original policy of Hawes & Stanley; and in every view, and for every purpose, that this statement was no evidence against them of the value of their property insured; either at the date of their policy, or at the time of the loss.

This motion must be denied, with costs, and judgment be entered upon the verdict.

JAMES G. BLAKE vs. EXCHANGE MUTUAL INSURANCE CO.¹

(Supreme Court, Massachusetts, November Term, 1858.)

Other Insurance. — What Policy covers. — Preliminary Proofs. — Application. — Several Insurances. — Adjustment of Loss.

This clause in a policy of insurance against fire, "other insurances permitted without notice until required," applies to insurance already existing on the property, notwithstanding that the policy provides that "in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this company and mentioned in or indorsed upon this policy," the policy shall be void and of no effect.

A policy of insurance on goods in "the brick building situate on Main Street, in C., known as D. & Co.'s Car Factory," covers goods in a building erected as a wing against the

¹ 12 Gray, 265.

Other Insurance. — What Policy covers. — Preliminary Proofs. — Application, etc.

rear wall of D. & Co.'s car factory on Main Street, with an opening through the wall of less than three feet square, usually closed by an iron door, if both wing and main building are used for manufacturing cars and known as "D. & Co.'s car factory."

If after the preliminary proofs of a loss by fire under a policy of insurance, the officers of an insurance company visit the premises and converse with the insured and make no reference to the preliminary proofs, or raise any objection to them, while any defect therein may be remedied, and refuse to pay on other and distinct grounds, the insurance company will be estopped to set up any defect in the preliminary proof, although the conditions made part of the policy give explicit directions about proofs of loss, and the policy provides that no condition, stipulation, covenant, or clause in the policy shall be altered, annulled, or waived, except by writing indorsed on or annexed to the policy, and signed by the president or secretary.

A policy of insurance expressed to be issued on property described in a certain application, "which is hereby declared to be a part of this policy and a warranty on the part of the" assured, and to be "made and accepted in reference to the written and printed application whereon it is issued," is not void, if there was no written application ever made; nor if issued upon a defective application, if that application was correct so far as it went.

Where property covered by several policies of insurance is destroyed, the proportion of its value to be paid by one underwriter is that which the amount of his policy bears to the amount of all the insurance thereon; although some of the policies cover other property in addition to this.

ACTION OF CONTRACT upon a policy of insurance against fire, made to the plaintiff for one year from the 11th of October, 1853, "on the following property, as described in application and survey No. 726, which is hereby declared to be a part of this policy and a warranty on the part of the aforesaid, namely, \$1,500 on stock of lumber, consisting of black walnut, mahogany, and other wood, in plank, board, and joist, contained in the second and attic stories of the brick building situate on Main Street, in Cambridgeport, Mass., known as Davenport & Co.'s car factory, and in the yard and shed attached to the same; other insurance permitted without notice until required;" any loss or damage "to be paid within ninety days after notice, proof, and adjustment thereof, in conformity to the conditions annexed to this policy;" and provided, that "in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this company and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance is a warranty on the part of the insured, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property insured; and that if any fact or circumstance shall not have been fairly represented, or if the said assured or his assigns shall hereafter make any other insurance

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on the same property and shall not give immediate notice thereof to the secretary, and have the same indorsed on this instrument, or otherwise acknowledged by him in writing, then this policy shall cease and be of no effect." It is also declared that this policy is made and accepted in reference to the written and printed application whereon it is issued, and also to the conditions hereto annexed, which are hereby made a part of this policy, and to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for. And it is also agreed and declared by the parties aforesaid, that no condition, stipulation, covenant, or clause herein before contained shall be altered, annulled, or waived, or any clause added to these presents, except by writing indorsed hereon or annexed hereto, by the president or secretary, with their signatures affixed thereto."

On the third page of the policy were printed "conditions of insurance," the first of which provided that "applications for insurance on property shall specify the construction and material of the building to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling or how otherwise; its situation with regard to contiguous buildings, and their constructions or materials; whether any manufacturing is carried on within or about it; and such description or specification shall be deemed a part of this policy, and a warranty on the part of the insured;" and the twelfth condition required persons sustaining loss by fire and claiming indemnity under this policy to give notice and proofs of loss as therein particularly directed.

At the trial in the superior court of Suffolk, at March term, 1857, before Nash, J., the plaintiff testified that when this policy was issued he had three other policies of insurance; one from the Mechanics' Insurance Company, for \$1,500, on the same property as this, and two from the Harmony and Lafarge Insurance Companies, each for \$2,000, on the same property, and also on manufactured stock. The judge ruled that the clause written in the policy, "other insurance permitted without notice until required," embraced existing as well as future insurance on the same property.

The plaintiff introduced evidence tending to show that originally a long brick building stood lengthwise by Main Street, in Cambridgeport, and was used by Davenport & Co. as a car fac-

tory; that two wings, one at each end, were built against its back wall, which was not taken down, but was the common wall of the main building and the wings; that the property insured was in the east wing, which communicated with the main building by an opening, having an iron door, three by two and a half feet, three feet above the floor, and constantly kept shut; and that the lower story of this wing and the other wing were used by Davenport & Co. for part of the work of their car factory, and a part of the plaintiff's work was done in the main building. The judge, against the defendants' objection, allowed the plaintiff to show, as matter of local designation, what structure was named and known as Davenport & Co.'s car factory; and instructed the jury, that if the wings and main building were so connected by a wall and door, and were all used in the business of manufacturing cars, and part of the wing, in which the plaintiff's property was, contained at the time of the fire cars in the process of manufacture, and the motive power of the whole structure came from one source, and the front and wings, as a whole, were known as "Davenport & Co.'s car factory," then, notwithstanding the separating wall, small opening for communication, distinct roofs, distinct entrances, and the fact that the wings did not touch Main Street, the plaintiff's property, if in the wing, was "in the brick building situate on Main Street, known as Davenport & Co.'s car factory," and the description in the policy was correct.

The plaintiff proved that the property was destroyed by fire on the 21st of January, 1856, and put in evidence certain notices and preliminary proofs sent by him to the defendants, which the judge ruled were insufficient to comply with the terms of the policy. After the introduction of evidence tending to prove the facts assumed in the following instructions, the judge instructed the jury, that the preliminary proofs could be waived, or the defendants estopped to avail themselves of defects in them otherwise than in writing indorsed on or annexed to the policy; that if the by-laws and conditions of insurance required certain preliminary proofs and notices to be given in a certain manner, and with certain particulars and details, and certain preliminary proofs and notices were given, not containing all the formal requisites, and, after receiving such proofs and notices, the defendants' president and secretary examined the premises, and had interviews with the plaintiff, before the expiration of the time for giving

said notices, and neither they then, nor the defendants afterwards, made any objection to the form or sufficiency of the preliminary proofs while any defects therein might have been remedied, and put their refusal to pay on other and distinct grounds, then such conduct might be considered a waiver of any defects in the preliminary proofs, or so far an estoppel that the defendants should not be allowed to avail themselves thereof, notwithstanding the provisions of the policy.

The defendants, upon notice from the plaintiff to produce any written application for the insurance in question, which might be in their possession, produced a memorandum made by the defendants' agent, to whom the plaintiff had applied for insurance, as to insurance being wanted. The plaintiff testified that he had no recollection of having signed or authorized any one to sign any written application or statement; and declined to put in this memorandum; and offered no further evidence that there was no application, or that he complied with his statements in an application. The defendants requested the judge to rule that inasmuch as the policy referred to and specified an application, and made it a part of the policy and a warranty on the part of the assured, it was necessary for the plaintiff, in order to recover, to put such application in evidence, and offer some evidence of compliance with the warranties therein contained, and the plaintiff, having failed to do so, could not recover; and also that if no application was ever filed in accordance with the terms of the policy, the policy was void and of no effect. But the judge declined to order a nonsuit; and ruled that the plaintiff must prove literal compliance with all warranties, or stipulations made warranties, appearing in the case; but that the provision for an application in writing was a provision for the benefit of the defendants, which they might waive and issue a policy without an application; and that the contract of insurance was not necessarily void, although there was no application, notwithstanding the reference to one in the policy. The defendants then, not waiving any exception to this ruling, put in evidence the memorandum sent to them, and introduced evidence tending to show that it did not correctly and fully describe the property, and that its warranties were not complied with; and the judge instructed the jury that if this paper was forwarded by the plaintiff's agent as ground or memorandum upon which the policy was to issue, and did issue, it was substan-

tially an application, so that its statements, representations, and descriptions must be literally complied with.

The defendants contended that the plaintiff could recover only that proportion of the value of the property insured which the amount of their policy bore to the whole amount of insurance on the property. And the judge so ruled as to all the insurance except the policies of the Harmony and Lafarge Insurance Companies; and as to them, ruled that they could not be included in making the computation, because they covered other property than that included in the defendants' policy. The jury returned a verdict for the plaintiff accordingly, and the defendants alleged exceptions.

THOMAS, J. 1. That the clause of the policy, "other insurance permitted without notice until required," relates to and covers insurance existing at the date of the policy, as well as insurance subsequently effected, is settled by the recent case of *Kimball v. Howard Fire Ins. Co.* 8 Gray, 33.¹

2. The evidence to show, as matter of fact, what structure was known as the Davenport & Co. car factory, was clearly competent. *White v. Mutual Fire Ins. Co.* 8 Gray, 566.² And the construction given to the policy by the presiding judge, in the light of the extrinsic evidence, was correct.

3. The question as to the waiver of any defects in the plaintiff's notice and proofs of loss is one of more difficulty. There can be no doubt that the conduct of the defendants would amount to a waiver, except for the last clause in the policy, by which it is "agreed and declared by the parties aforesaid, that no condition, stipulation, covenant, or clause herein before contained shall be altered, annulled, or waived, or any clause added to these presents, except by writing indorsed hereon or annexed hereto by the president or secretary, with their signatures affixed thereto." There is a previous provision that in case of loss the money is "to be paid within ninety days after notice, proof, and adjustment thereof, in conformity to the conditions annexed to the policy." The provisions for notice and proofs of loss are contained in the twelfth of the by-laws. The entire by-laws are printed under the heading "Conditions of insurance." The policy is declared to be made and accepted in reference to the conditions thereto annexed, which are made part of the policy. How far the provisions as to the form of the notice and proofs of loss, after

¹ *Ante*, p. 176.

² *Ante*, p. 216.

a valid contract has been made and a loss taken place under it, can be regarded as conditions of the contract itself, it is not necessary to determine, nor whether their being classed under the designation of conditions of insurance could change the nature and purpose of the stipulations themselves; for it seems to us that the question is not as to the provisions of the contract, but as to the performance of the provisions. The plaintiff is not seeking to set up a contract from which a material provision has been omitted by the oral consent of the officers of the company. The policy contained the usual provisions as to notice and proofs of loss. Upon the happening of the loss, the plaintiffs sent to the defendants certain notices and proofs in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice to the insured. If they failed to do so; if they proceeded to negotiate with the plaintiff without adverting to the defects; if, still further, they put their refusal to pay on other and distinct grounds, they are, upon familiar principles of law, estopped to set up and rely upon the defective notices; the law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary. *Vos v. Robinson*, 9 Johns. 192; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 401;¹ *Heath v. Franklin Ins. Co.* 1 Cush. 257;² *Clark v. New England Mutual Fire Ins. Co.* 6 Cush. 342.³ If the plaintiff relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification, or addition, by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question is not open. The adherence to and liberal application of this principle are necessary to the maintenance of good faith and fair dealing in judicial proceedings.

4. The questions made as to the application are of less difficulty. There is nothing in the policy or in the conditions attached to it, which makes an application in writing by the plain-

¹ *Ante*, vol. 1, p. 576.² *Ante*, vol. 2, p. 634.³ *Ante*, vol. 3, p. 131.

Notice of Loss.

tiff essential to the validity of the contract. If the underwriters chose to issue a policy without such application, or with an application defective but true as far as it went, they must be held to have waived the want of the application or its defects. *Hall v. People's Ins. Co.* 6 Gray, 185; *Liberty Hall Association v. Housatonic Mutual Fire Ins. Co.* 7 Gray, 261.

5. The court erred in instructing the jury that no abatement of the amount to be recovered of the defendants could be made on account of the Harmony and Lafarge policies, because those policies covered other property besides that covered by the defendants' policy. We think those policies, though covering manufactured as well as unmanufactured stock, must sustain their proportion of the loss. The rule of adjustment will be this: Ascertain the stock covered by the policies at the time of the loss, manufactured and unmanufactured. Ascertain the amount of the manufactured and of the unmanufactured separately. Then as the value of the entire stock is to the sum insured, so would be the amount of the unmanufactured to the result sought. For example: The entire stock is, say \$2,100. Of this the manufactured is \$1,500; the unmanufactured \$600. The amount insured on both is \$700. As \$21,000 is to \$700, so is \$600 to the answer.

If the parties cannot agree upon the amount, or upon an assessor to fix it, the case must go to a new trial, limited to the question of damages only. *Exceptions sustained.*

MANN & HOBSON vs. WESTERN ASSURANCE Co.¹ (Queen's Bench, Upper Canada, Michaelmas Term, 1858.) *Notice of Loss.*

One of the conditions in a policy required that the assured should "give immediate notice of any loss or damage by fire, within fourteen days, to the agent of the company," and as soon after as possible should deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation, and should also declare on oath or affirmation . . . in what manner the buildings were occupied at the time of the loss, and who were the occupants. That they should also produce a certificate under the hand and seal of a magistrate most contiguous to the place of the fire, that he had examined the circumstances, and believed the claimant had, without fraud, sustained loss to the amount which the magistrate should certify; and until such proofs, declarations, and certificates were produced, the loss should not be payable.

A fire occurred on the 3d of July; on the 7th, one of the plaintiffs signed a written notice to defendants, stating the destruction of the mill; that its whole value was \$2,400, and that there was no other insurance; at the foot of which was a certificate, under the hand and seal of a J. P., stating that he had examined several persons on oath in the matter,

¹ 17 Up. Can. Q. B. 190.

Notice of Loss.

&c., and that he believed the assured had, without fraud, sustained loss by the fire "to the amount of his insurance and over."

On the 10th one of the plaintiffs received a note from defendants' agent, to say that the papers sent were not in compliance with the policy; and on the 20th, the following notice was sent to him, signed by the plaintiffs: "Gentlemen, — We hereby notify you that a fire occurred on our premises on the night of the 3d of July, by which the following property was destroyed: to wit, a saw-mill, whole value \$2,400. We have not had any other insurance effected on said saw-mill. The above named sum is the whole value of the subject insured. The property is owned by us. The building was used as a saw-mill only," &c. (adding a short statement of the circumstances attending the fire). At the foot was written, "Sworn and affirmed before me, at Galt, this 14th of July, 1858. (Signed) Theophilus Sampson, J. P.;" and underneath the same justice certified that he had made inquiries, and believed the facts set forth, and that the plaintiffs had, without fraud, sustained loss to the amount therein mentioned. This was not under his seal.

The defendants, by their plea, denied the loss, in the usual form, and under it desired to show that the building had been designedly set fire to. *Held*, that this evidence was rightly rejected, and that an application to add such a plea at the trial was properly refused.

Held, also, McLEAN, J., dissenting, that the plaintiffs could not recover, for the condition of the policy above mentioned had not been complied with.

As to the particular objections taken: *Held*, 1. That the certificate and affidavit were in time; and that it was unnecessary that the notice or affidavit should be given or made by all the owners of the property insured. *Semble*, that a notice given within fourteen days would be sufficient.

Per ROBINSON, C. J., that the paper sent on the 20th was insufficient, for it could not be treated as an affidavit of the truth of the statements as to the loss, or of anything more than that the notice was given. BURNS, J., dubitante; but *held*, that the omission to state what persons occupied the building at the time of the loss was fatal.

3. *Semble*, that the defect in the jurat, in not stating which of the plaintiffs were sworn and which affirmed, would not have been fatal.

4. That both certificates were insufficient, for not stating specifically the amount of the loss; and the second certificate for want of a seal.

MANN & HOBSON vs. WESTERN ASSURANCE CO.

(19 Up. Can. Q. B. 314.)

The plaintiffs brought an action against these defendants on a policy of insurance, which provided that the assured should "give immediate notice of any loss or damage by fire within fourteen days, to the agent of the company," &c., &c., and, "as soon after as possible," should deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; . . . that they should also make a declaration and produce certain certificates specified; and that until such proofs, declarations, and certificates were produced, the loss should not be payable.

At the trial the notice required was proved, but the certificate and affidavit produced were afterwards held by the

court to be insufficient, and a nonsuit was entered. The plaintiffs then, about eleven months after the fire, furnished a new and sufficient affidavit and certificate, and brought another action, in which the defendants pleaded that the plaintiffs did not, as soon after the fire as possible, deliver these papers. It appeared that when the first papers were furnished defendants objected to their sufficiency, and that others were a few days after delivered, to which it was not shown that the plaintiffs were notified of any objection until the first trial. *Held*, that the words "as soon as possible" must be construed to mean within a reasonable time under the circumstances; and BURNS, J., dissenting, that it was properly left to the

Exposures within ten Rods.

jury to say whether, considering all the facts, the defendants had complied with the condition by furnishing the second set of papers, and was not a question of law upon which the judge should have decided.

The plaintiffs, while in partnership, had purchased the land, on which they afterwards built the mill in question, which was burned, from one A., who held their bond for the balance of purchase money. Before the fire they dissolved partnership by a deed, in which it

was agreed that Mann should wind up the business, and should hold "the mill property" for his own use, but no regular conveyance of it had been executed. *Held*, that Hobson had sufficient interest to enable him to join in suing on the policy.

Held, also, that the affidavit and magistrate's certificate last furnished were sufficient, though Mann, who alone made the affidavit, was described as solely interested in the property, and the certificate stated the loss as his only.

MCKENZIE *et al.* vs. VANSICKLES *et al.* Times and Beacon Insurance Co. garnishees.¹ (Queen's Bench, Upper Canada, Michaelmas Term, 1858.) *Alteration. — Pleading.*

In an action on a policy of insurance, defendants pleaded a communication opened between the building where the goods insured were and the building adjoining, without notice to them, contrary to one of the conditions of the policy. At the trial it appeared that they had misdescribed the alteration on which they intended to rely, but it was also shown that such alteration had not in any way caused or contributed to the fire. *Held*, that under these circumstances an amendment of the plea was properly refused.

MCLACHLAN vs. ÆTNA INSURANCE Co.² (Supreme Court, New Brunswick, Michaelmas Term, 1858. *Other Insurance. — Issuance of Policy.*

One of the conditions of a policy of insurance was, that if the assured should have any other insurance on the property, not notified to the insurers and indorsed on the policy, the insurance should be void. At the time of insuring his house with the defendants, the plaintiff had an insurance thereon in the name of M., in an office in the State of Maine. *Held*, that as by the law of this country, neither the plaintiff nor M. could recover on that policy, the defendants, in order to avoid their policy for want of notice of the previous insurance, should have shown that by the law of Maine the plaintiff could recover on the policy effected by M.

The business of an insurance company was managed by an agent residing in St. John, to whom applications for insurance in other parts of the Province were made through brokers. *Held* (per BRTCHIE, J.), that a policy was issued when the agent forwarded it to the broker for delivery.

Notice of a prior insurance to an insurance broker is not notice to the company.

CHAFFEE vs. CATTARAUGUS COUNTY MUTUAL INSURANCE Co.³ (Court of Appeals, New York, December, 1858. *Exposures within ten Rods.*

The application for insurance in this case contained the interrogatory, "Relative situation as to other buildings; distance from each within ten rods; for what purpose occupied?" *Held*, that this question called for all the buildings within ten rods and their several distances from the building proposed for insurance.

¹ 17 Up. Can. Q. B. 226.

² 4 Allen, New Bruns. 173.

³ 18 N. Y. 376.

Title. — Non-disclosure.

The answer to this question contained the names of various buildings within ten rods, with their respective distances from the building insured, and closed with the statement, "All exposures within ten rods are mentioned." *Held*, that giving the language a fair, natural construction, it asserted that the buildings named were all the buildings within ten rods, and not merely all the "exposures" in the sense of such as increased the risk. And the application being made part of the contract, *held*, that the answer being untrue, the policy was avoided.

BROWN vs. CATTARAUGUS COUNTY MUTUAL INSURANCE CO.¹
(Court of Appeals, New York, December, 1858.) *Renewal of Policy. — Other Insurance.*

Evidence *held* inadmissible by STRONG, J., to prove the knowledge of the defendant's agent of certain facts wrongly stated in the application, on the ground that the application being made part of the policy, the evidence would tend to control and limit the meaning of the contract.

The renewal of an existing policy is not other insurance in the sense of a requirement of the policy in suit that the assured should with reasonable diligence give notice of any other insurance effected upon the property.

PLUMB vs. CATTARAUGUS CO. MUTUAL INSURANCE CO.²
(Court of Appeals, New York, December, 1858.) *Authority of Agent.*

No denial being made on the trial that the agent of the defendants had the authority which he assumed to possess, it will be considered that he had such authority. And therefore having assumed to make the survey, and having stated that his measurements were correct, and the insured not knowing the contrary, *held*, that the company could not object to them.

EMINENCE MUTUAL INSURANCE CO. vs. JESSE.³ (Court of Appeals, Kentucky, Winter Term, 1858.) *Title. — Non-disclosure.*

The charter of an insurance company provides that every person obtaining insurance shall thereby become a member of the company, during the continuance of his policy, and liable for his proportion of losses, &c., incurred whilst he is a member; that his right, title, and interest in the land on which the buildings insured are situated shall be pledged to the company, who shall hold a lien upon the same; that policies should be deemed valid in all cases where the insured has a title in fee simple, unincumbered, to the buildings insured, and to the land covered by the same; but if the insured have a less estate in the land, then the policy to be void, unless the true title of the assured be expressed in the policy. The building insured in this case, as well as the land upon which it was situated, belonged to the wife of the assured, which fact was not disclosed to the company, nor expressed in the policy, which was procured by the husband in his own name as owner of the property, at its full value. *Held*, that the policy was not binding on the company.

¹ 18 N. Y. 385.² 18 N. Y. 392.³ 1 Met. (Ky.) 523.

Warranty. — Opinions.

JOYCE vs. MAINE INSURANCE CO.¹

(Supreme Court, Maine, Cumberland, 1858.)

Warranty. — Opinions.

A mere statement of the occupation of a house by the insured is not a warranty that it shall continue so occupied.

The opinion of a witness skilled in insurance cannot be taken as to the effect upon the risk of having a house unoccupied.

The mere requirement of notice of increase of risk without any penalty for failure need not be performed (the loss not having occurred by reason of the increase), though the provision state that upon such notice the company shall have the option to terminate the contract; for it cannot be certainly assumed upon the trial that the contract would have been terminated.

THE case is stated in the opinion.

TENNEY, C. J. In the defence of this action, which is on a policy of insurance against a loss by fire, the opinions of certain persons, who were shown to have had experience in the business of insurance, as to the comparative risk of a dwelling-house which had been vacated after the occupation thereof, and when the occupation had continued; and, whether the premiums of insurance would or would not be increased in consequence of the owner vacating the house, were offered, and, on the plaintiff's objection, excluded.

None of the inquiries related to matters of science and skill. 1 Greenl. Ev. § 440. A witness cannot give his views on the manner in which others would probably be influenced, if the parties acted one way or the other. Therefore, the opinion of a person conversant with the business of insurance, upon a question whether a premium would have been increased by the communication of certain specified facts, has been held inadmissible. 1 Greenl. Ev. § 441, and notes (1) and (2).

The defendants offered to prove that a small stable, standing on a lot adjoining the one upon which the dwelling-house insured was situated, owned by a third person, was removed to a spot nearer to the house insured than that on which it stood at the date of the policy, and had been raised in height, and increased in other respects; this evidence was excluded on the plaintiff's objection.

It is stated in the policy, that "this policy is made and accepted in reference to the application for it, and to the conditions hereto annexed, which are hereby made a part of this contract, and are to be resorted to, in order to ascertain and determine the

¹ 45 Maine, 168.

Warranty. — Opinions.

rights and obligations of the parties hereto, in all cases, not herein otherwise specially provided for." In the conditions referred to as stated in the body of the policy is the following, in number 4: "If, after insurance is effected on any building or goods in this office, &c., the risk shall be increased, by any means whatsoever within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, of which prompt written notice shall be given to the company by the assured, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the assured or his representative, of their intention to do so, in which case the company will refund a ratable portion of the premium."

By the former of the two periods, quoted from the conditions, the acts of the assured, therein specified, are to be followed by a forfeiture of all benefit from the policy. In the latter, it is otherwise. If the evidence offered would embrace such a case as last described, which may well be doubted, but upon which no opinion is given, such use of the neighboring premises does not avoid the policy; but prompt notice to the company is alone required by the terms of the condition. The company cannot assume that they would have terminated the insurance, if the notice had been given of the removal of the stable from one part of the lot to another, of which the plaintiff had no control, and, as the fire which destroyed the building was not due to the removal of the stable, no injury would be proved to have been done to the company, if this evidence had been admitted.

The house insured is represented in the policy as occupied in part by William H. D. Joyce. This cannot be an agreement that he should continue in the occupation, but it is merely descriptive of the house, such as is common in a deed of conveyance.

We are satisfied that the rulings were free from legal error. According to the agreement of the parties, judgment is to be entered for the plaintiff.

HATHAWAY, CUTTING, MAY, GOODENOW, and DAVIS, JJ., concurred.

HORACE P. STORER vs. ELLIOT FIRE INSURANCE CO.¹

(Supreme Court, Maine, Cumberland, 1858.)

Ambiguity. — Evidence.

Parol evidence held admissible to show that certain other policies upon goods "in the building," the chambers of which only were occupied by the plaintiff, did not cover the goods of the plaintiff in said chambers.

THE case is stated in the opinion.

GOODENOW, J. This is an action on an insurance policy, dated April 30, 1856. The writ bears date December 17, 1856. It was admitted that the fire took place June 24, 1856, and that the plaintiff sustained a loss thereby, to the amount of \$4,488.67, which sum, with interest thereon from July 26, 1856, the plaintiff is entitled to recover of the defendants, if he is entitled to recover his *whole loss from them*, without contribution from other insurance companies.

The defendants offered, subject to objection, a policy of Howard Fire Insurance Company, dated September 25, 1854; a policy of Springfield Fire & Marine Insurance Company, dated September 13, 1853; and a policy of Hampden Insurance Company, dated November 6, 1854, to the plaintiff; and also the application on which the policy in the office of the Springfield Company was founded; and the application, dated April 28, 1856, on which the policy in suit was founded. It was admitted that these policies were renewed yearly, until the fire. The plaintiff was insured, under defendants' policy, "\$5,000 on his stock of merchandise contained in the chambers of a four-story brick and slated building, occupied by him and others, situate on the north-erly side of Middle Street, and extending through to Temple Street, in Portland, Maine, as per application and plan, No. 6147, on file at this office, forming part of this policy and warranty on the part of the assured."

The policy further provided that "other insurance (should be) permitted without notice, until requested." And "that, in case there should be any other insurance made as aforesaid, on the property hereby assured, whether prior or subsequent, the assured shall be entitled to recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon."

¹ 45 Maine, 175.

The plaintiff was insured in the Howard Fire Insurance Company \$2,000 "on his stock of dry goods and fixtures of store, contained in a four-story brick store, situate on Middle Street in said Portland."

He was also insured in the Hampden Fire Insurance Company \$2,000 "on his stock of merchandise, composed principally of dry goods and ready-made clothing, contained in a four-story brick building on the northerly side of Middle Street."

Also, in the Springfield Fire & Marine Insurance Company "\$5,000 on his stock of dry goods and fixtures contained in a four-story brick store, situate on Middle Street and on Temple Street, and being numbered 125, Mussey's Row, so called, as described in a survey, No. 143, on file in this office," which is a part of the policy.

The application states the insured property to be "in a four-story brick store, slate roof, situated on Middle Street, in Portland."

The plaintiff, being called by his counsel, testified that at the times said three policies, in the Springfield, Howard, and Hampden offices were issued, he occupied part of a building known as the "Mussey Block," on the northwesterly side of Middle Street, in Portland; that L. D. Hanson & Co.'s store formed a part of said block; that their store was separated from the other part by a brick wall, from bottom to top, and that they occupied from cellar to attic, said store being arranged to be so occupied, with stairs inside communicating with the different stories, and there was no access to the chambers excepting through the room in the lower floor. This store was No. 19, on Middle Street. The other part of said block was finished for two stores, on the ground floor, with basements under them, and the chambers over them were occupied as lawyers' offices, and for other purposes. After going into a more minute description, he states that his store consisted of the ground floor and basement under it. It had no connection with any other part of the building. It was known as No. 125. The chambers were numbered 123. At the times the insurance was effected in the Springfield, Howard, and Hampden offices, he had no right in any other part of the building. The chambers were then occupied by other parties. That, in 1855, he went into the wholesale business, having been previously engaged in the retail trade; that, at different times dur-

Ambiguity. — Evidence.

ing the year 1855, he hired these chambers in the building, two, at first, on the second floor, then the room in the third story; there was no connection between these chambers; they were hired at different times, and at different rents. The chamber in the third story was used as a storeroom for whole bales and packages of goods; there was no way of passing from his store to either of said chambers, without going into the street.

The plaintiff also testified, that the agents of the Hampden and Howard offices, and of the Springfield Office, when they took the risks, examined the premises, and he pointed out to them the portion of the building occupied by him as his store, and wherein he wished insurance, and the premium was fixed upon such examination; that he did not have any intention of change of business, or of hiring these chambers at the time insurance was effected in these offices. After he had hired the three chambers, he applied to the agent of the three offices before named, and obtained a separate insurance in the defendant company, of which the same person was also agent, and that he charged a higher premium, the risk being greater.

The third-story chamber, where the goods were lost, was next to Temple Street, which was narrow, and opposite were wooden buildings, and just above was a livery stable, from which the fire took; that he hired this chamber after the last renewal of the other policies. At the time of the fire the stock in the store No. 125, that is, the lower floor and basement, was between \$25,000 and \$30,000, and the loss there amounted to about \$2,500.

It is contended, on the part of the defendants, that the three first policies, as well as the policy of the Elliot Company, covered the stock of the plaintiff in the chambers of the four-story brick store, the only distinction being that the policy of the Elliot Company covered that in the chambers *alone*, while the other policies covered whatever he had in either or all the four stories. And, also, that there was no ambiguity in the descriptions in the policies.

Did the three policies, or either of them, introduced by the defendants, cover the merchandise in the chambers? If they did not, it will become unnecessary to consider the second proposition of the defendants.

Taking into view the several descriptions contained in the four policies which have been introduced in evidence in this case, we

Void Policy. — Assignment.

find a latent ambiguity, which may be removed, and which, in our opinion, has been removed by parol testimony. The parol testimony introduced does not vary or contradict the language of the policy on which this suit is founded. It only goes to show where the property was to be found, to which the policy was intended to apply. The building, in which the goods were, may be found without the aid of parol testimony. But it is found to contain other occupants beside the plaintiff, with different entrances, and carrying on different kinds of business. Were the policies intended to apply to goods in the whole building? The parol testimony shows that the plaintiff occupied only a part of it when the three first policies were issued. It shows the part he occupied when the last policy was issued, which was "on his stock of merchandise, contained in the chambers of a four-story brick and slated building, occupied by him and others," &c.

We are of opinion that the parol testimony offered was admissible, and that the three first policies did not, nor did either of them, cover the merchandise in the chambers or any part of it; and that, therefore, the plaintiff is entitled to recover of the defendants for his *whole loss*, as before stated.

Defendants defaulted. Damages, \$4,488.67, and interest on the same from July 26, 1856.

TENNEY, C. J., HATHAWAY, MAY, and DAVIS, JJ., concurred.

FRANKLIN EASTMAN vs. CARROLL COUNTY M. F. INS. CO.¹

(Supreme Court, Maine, York, 1858.)

Void Policy. — Assignment.

It does not render a void policy valid that it has been *assigned* with the consent of the company.

THE case is stated in the opinion.

MAY, J. The defendants are a Mutual Fire Insurance Company, a corporation created by the Legislature of the State of New Hampshire, and this action is brought upon a policy of insurance originally given to one Ira Ramsell, a resident of this state, and by him assigned to the plaintiff. It appears from the application of said Ramsell, which forms a part of the policy, that when the insurance was procured he represented that the prop-

¹ 45 Maine, 307.

Void Policy. — Assignment.

erty insured was not incumbered by mortgage or otherwise, and a lien was given to the company thereon, for the payment of all assessments. It turns out, however, that said Ramsell had no title or interest in the property, and that the title then was, and continued to remain in one John Jameson until he conveyed to the plaintiff, February 8, 1851.

It is conceded, in the argument for the plaintiff, that the policy, by reason of the fact before stated, was void while it remained in the hands of said Ramsell; but, it is contended, that it became valid and binding upon the company by virtue of an assignment from said Ramsell to the plaintiff, bearing date March 27, 1851, the same having been consented to in writing by the defendants, or their agents, when made. The plaintiff claims to recover, as assignee of the policy, the property insured having been consumed by fire on the ninth day of June, 1852, at which time he was the owner.

The policy was issued subject to the by-laws of said company. By article fifteen of these, it is provided that, "in case of the alienation of any house or building by sale or otherwise, or in case of removal, where furniture or goods only were insured, the policy shall thereupon be void, and shall be surrendered to the directors to be cancelled; and, on such surrender, the insured shall be entitled to recover his deposit notes on payment of such proportion of all losses and expenses prior to such surrender, provided that the grantee or alienee above named, having the policy assigned to him, may have the same ratified and confirmed for his benefit on application to the directors within thirty days, and giving security to their satisfaction for the remaining term of the policy; and, in such case, he shall be entitled to all the privileges and incur all the liabilities of the institution equally with other members." It was, undoubtedly, the intention of the parties to said assignment, and of the defendants' agents in consenting thereto, that it should have effect under and by virtue of said by-law. No other clause is found, either in the charter or by-laws of the defendants, which confers upon their directors any authority to bind the company by reason of any assignment of a policy not made in pursuance of said by-law. The directors, therefore, can bind the company only when acting in accordance with its provisions, and in the cases therein provided.

In the case under consideration, were the acts of the directors

Void Policy. — Assignment.

authorized by the by-laws? or, in other words, was the assignment relied on, as a ratification or confirmation of the original policy, made in pursuance of its provisions? Was there an *alienation* of the property insured such as the by-law contemplates, and, if so, was the application for consent to the assignment of the policy seasonably made? The policy was issued upon the understanding that the assured was the owner of the property insured. It is so in all cases. When, therefore, the by-law speaks of an alienation by sale or otherwise, it manifestly means an alienation by the party insured. The conveyance, therefore, from John Jameson to the plaintiff, was not an alienation within its meaning. He had no interest in the policy, and the defendants were in no way responsible to him. The alienation by him could not render the policy void, because, while Ramsell held the policy, the rights of the defendants would not be affected by the sale. It was a matter of indifference to them whether Jameson or his grantee were the owners of the property insured. If the party insured, at the time of the issuing of the policy, had no interest in the property covered by it, then the policy was void. He must, therefore, have had an insurable interest in the property when insured, to make the policy valid; and it is an alienation of that interest which alone can render the policy void; and the authority of the directors, under the by-law, to ratify and confirm assignments in cases of the sale or alienation of the property insured, applies only to policies which are made void by such an alienation, and not to such as were originally void. The alienation, therefore, referred to in the by-law, must of necessity be made by the party who is insured. If, however, the contingency upon which the directors are empowered to act had occurred, as no application was made to them within thirty days after the conveyance from Jameson to the plaintiff, the power conferred by the by-law had, by express limitation, ceased to exist long before the action on their part upon which the plaintiff relies. For the reasons before stated, the assignment of the policy was inoperative, and no new force was imparted by it to the policy in suit.

If, however, the difficulties which have been suggested could be avoided, there is still an obstacle in the way of the plaintiff's recovery. The assignment itself recites that the plaintiff is to hold the policy "*subject to all the liabilities and entitled to all the benefits to which he, the said Ramsell, was entitled by virtue thereof.*"

It does not profess to create any new rights, but simply to transfer subsisting ones. The defendants, when they consented to its transfer, do not appear to have been aware that Ramsell was not the owner of the property to which the policy was designed to attach. They must have supposed, from the language of the assignment (in which he speaks of having sold and conveyed the buildings to the plaintiff), that he was the owner, and that it was therefore subject to the lien which was referred to in his application for insurance. From this application, and from the recitals in the assignment, the directors, at the time they consented to the transfer, had good reason to believe that the policy was then valid, and that the title to the property insured was in Ramsell, and that it remained in him until his conveyance to the plaintiff. They might, therefore, well conclude that the lien provided for in the policy, inasmuch as the plaintiff took the policy subject to all the liabilities of Ramsell, would continue upon the property insured, notwithstanding its conveyance, and be sufficient security for all assessments then and subsequently to be made. Hence the defendants neither took nor required any new note or security therefor, and the plaintiff gave no lien upon the property after it was conveyed to him. The lien, therefore, which was contemplated by the parties to the policy, and which was then understood to exist, never did, in fact, attach. In this the defendants or their agents were deceived, being led into error by the misrepresentations of Ramsell, in regard to his title, as contained in his application to be insured, and repeated in the assignment with the knowledge and assent of the plaintiff. Under such circumstances, we think, it cannot properly be said that the defendants, by the written consent of their directors to the assignment upon the policy in suit, have either ratified or confirmed the same, so as to make the policy, which is conceded to have been originally void, a valid contract in the hands of the plaintiff; and, for this reason, this action cannot be maintained. *Plaintiff nonsuit.*

CONCORD UNION MUTUAL FIRE INSURANCE CO. vs. CHARLES WOODBURY.¹ (Supreme Court, Maine, Sagadahoc, 1858.) *Amount of Recovery. — Mortgage. — Subrogation.*

When a mortgagor insures his own interest without any agreement between him and the mortgagor therefor, and a loss accrues, the mortgagor is not entitled to an allowance of

¹ 45 Maine, 447.

Entire Contract. — Misrepresentation.

the sum paid upon such loss to be applied to the reduction or discharge of his mortgage debt, but the mortgagee may recover the whole amount due. See *King v. State Ins. Co. ante*, vol. 3, p. 186, and note.

The court observed, however, that it had been often held, where the mortgagee effects insurance for himself and a loss accrues which is paid by the insurers, that they were entitled to have the mortgage and note assigned to them, which they might enforce against the mortgagor. *Etna Fire Ins. Co. v. Tyler, ante*, vol. 1, p. 576; *Carpenter v. Providence Ins. Co. ante*, vol. 2, pp. 120, 448. But this was denied in *King v. State Ins. Co. supra*.

But while he might insure for his own benefit and recover the whole sum to his own use, it is equally clear that when the mortgagee effects insurance at the request and cost and for benefit of the mortgagor, as well as for himself, the latter has a right in case of loss to have the insurance money appropriated to the discharge of his indebtedness.

LOVEJOY vs. AUGUSTA MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Maine, Somerset, 1858.)

Entire Contract. — Misrepresentation.

One note being given for a specified insurance on a stock of goods and a further sum on a store containing them; *held*, that the contract was entire, and that a misrepresentation as to the title of the building avoided the policy *in toto*.

THE case is stated in the opinion.

HATHAWAY, J. Assumpsit on a policy of insurance, by which the defendant company insured the plaintiff two hundred and fifty dollars, on a store, and five hundred dollars on a stock of goods in the same store, as his property, against loss by fire, on his application of the same date with the policy. The store was destroyed by fire, December 5, 1854.

The charter of the defendant company, their by-laws, and the plaintiff's application, are parts of the policy.

In his application the plaintiff represented himself to be the owner of the store and goods. He requested insurance on *his* store and goods. He stated that the store was occupied by the owner, and that there was no incumbrance on it, and added, "I have given the above description knowing that any misrepresentation or suppression of material facts will destroy my claim upon the company for indemnity."

By article 10 of the by-laws, "in cases where no permanent lien can be created on merchandise, or other personal property, the directors shall require a surety on the deposit note." No surety was given on the plaintiff's deposit note, and none seems to have been required.

The case finds "that, at the time when the application was

¹ 45 Maine, 472.

Report of Committee as to Loss.

made, the store in question and the lot of land on which the same was situate were the property of Olive Emery, and that, July 30, 1853, she conveyed the same to Thomas A. White, who remained the owner of the same up to the time the store was burned.

The contract of insurance was entire, and the representations made by the plaintiff, in his application for insurance, of his ownership of the store, being of a material fact, and being false, the policy was, therefore, void; *Friesmuth v. Agawam Mut. Fire Ins. Co.* 10 Cush. 587; ¹ 11 Cush. 280; 6 Cush. 340; *Battles v. York Co. Mut. Fire Ins. Co.* 41 Maine, 208; and this action cannot be maintained.

As agreed by the parties, there must be

Judgment for the defendants.

TENNEY, C. J., RICE, APPLETON, MAY, and DAVIS, JJ., concurred.

INSURANCE CO. vs. RUPP.²

(Supreme Court, Pennsylvania, Philadelphia, 1858.)

Report of Committee as to Loss.

The report of a committee of a mutual insurance company, appointed by the president in accordance with the provisions of the act of incorporation, to examine and inquire into a loss, and after ascertaining the sum to which the insured is entitled to make provision and payment thereof, is not conclusive of the amount of the loss in an action by the insured against the company on the policy of insurance.

ERROR to the court of common pleas of Lehigh County.

This was an action of covenant by Benjamin Rupp against the Mutual Fire Insurance Company of Sinking Springs, in Berks County, on a policy of insurance. The defendant is a corporation chartered in 1843, and organized on the mutual plan, each insurer being a member of the corporation. Its corporate powers are vested in a board of thirteen managers, who are elected annually. The company has no capital stock, but defrays all expenses and losses by assessments on the members. By the seventh section of the charter, "any member who shall sustain loss by fire shall give immediate notice to the president of the company, who shall appoint a committee of three of the managers that shall examine and inquire into the same; and the said managers, with all convenient expedition, shall inquire into the same, and after ascertaining the sum which said party shall be lawfully entitled to, shall make provision and payment as specified."

¹ *Ante*, vol. 3, p. 465.

² 29 Penn. St. 526.

Report of Committee as to Loss.

On the 1st of November, 1850, the plaintiff caused his dwelling-house to be insured in this company, in the sum of \$1,000, furniture therein at \$600; and on the 20th of October, 1854, the house, with a part of its contents, was consumed by fire. Information of the fact was communicated to the company, and on the 21st of the same month, the president appointed a committee of three managers, under the seventh section of the charter above quoted, who met on the 24th of the same month on the premises. The committee adjourned to meet in Reading, at the annual meeting of the company, on the 1st Monday of November, 1854. The plaintiff did not attend this adjourned meeting, and on the 15th of November, 1854, the committee again met at his residence to ascertain the loss. They made a report to the president, by which they award "the sum of \$1,000 for the loss sustained, to wit: the sum of \$500 for the buildings, and the sum of \$500 for the household goods and kitchen furniture, &c., therein destroyed, and direct the treasurer to pay the said amount to the said Benjamin Rupp, or his assignees, &c., out of the funds received from assessment No. 3, now to be levied by the company to meet this, with other losses lately sustained by members of the said company." The plaintiff, claiming that his loss greatly exceeded the amount reported by the committee, refused to receive the same; and the company refusing to pay any greater sum, this action was brought.

On the trial in the court below, the plaintiff, under objection, gave evidence by witnesses of the value of the buildings destroyed.

The defendant presented, among others, the following points:—

That the power of ascertaining the amount due to the plaintiff for the loss which he sustained by the fire of October, 1854, is by the charter vested in the committee of three of the managers, who were appointed by the president for that purpose; that their decision, when made in accordance with the charter, is binding on both parties, and that from it there is no appeal.

The court below answered this point as follows:—

"The important point in the case is the second point presented to the court by the defendant, namely, that the ascertainment of the loss by this committee, if in accordance with the charter, is binding and conclusive on the plaintiff. There is no provision in the seventh section that it is to be binding and conclusive; and I

Report of Committee as to Loss.

am of opinion that the power given to a committee to examine, and to the managers to inquire and ascertain, was for a different purpose than to make the ascertainment conclusive on both parties. I do not think, therefore, that this second point of the defendant is well taken, and I answer it therefore in the negative.

“ But although this ascertainment of the loss is not binding and conclusive, the report of the committee and the testimony of its members are before you, and if you consider their estimate of the damages sustained by the plaintiff the correct one, you have the right to adopt it.”

The jury found for the plaintiff \$1,776.50, and judgment was entered on the finding.

Thereupon the defendant sued forth this writ, and assigned, *inter alia*, the answer of the court to the above stated point for error.

The opinion of the court was delivered by

PORTER, J. Was the plaintiff concluded by the action of the committee? He was a member of the corporation, for it was organized on the principle of mutuality, and he was bound by its charter and by-laws. What of that? If the association had been a partnership, and he had set his hand to the very words on which the question is supposed to hinge, it is more than doubtful whether they contain anything sufficient to oust the jurisdiction of the courts of justice. It is not necessary to go far for the reasons. The plaintiff had no hand in selecting the committee. It was done by the president of the company, which, though entitled to hold the plaintiff as a member, was nevertheless his adversary. The men who were constituted his judges were interested to diminish his claim, for they were liable to pay their proportionate part of the assessment necessary to meet it. No notice of their meeting was given. No hearing of both sides was enjoined. No system of evidence was provided. The testimony of other members as interested as the tribunal was probably received. The by-laws seem to require an oath; but an oath without cross-examination is of little efficacy in developing the truth. The duties of the committee are plain. They are to examine and inquire into the loss. No report is necessary. They are to ascertain the sum to which the party is entitled, and make provision for its payment. There is no decision or award in the legal acceptance of those terms, and consequently no right of appeal by

 Alienation. — Retirement of Partner.

exception from the committee to the board. Nor is there any appeal respecting the form or substance of the committee's action to any other tribunal. The law looks with a jealous eye on the very best appointed machinery for forestalling its own action in its own way, because it will ordinarily be found that those institutions which have been sanctioned by the wisdom of ages, and adopted generally by civilized man, are better than the crude experiments of a day. If justified in delegating its functions at all, such a tribunal as this ought not to be selected. With what powers, then, did the legislature clothe the committee? Simply to inquire into the loss and ascertain a sum which would form the basis of an assessment. If the claimant accept it, well; if he proceed adversely and change the amount, their work is to be done over. In no event can that which was intended for the convenience of the company be turned into an act binding on the assured and the court. This is the only point worthy of discussion.

Judgment affirmed.

FARMERS' AND MECHANICS' INSURANCE COMPANY vs. SIMMONS et al.¹ (Supreme Court, Pennsylvania, Philadelphia, 1858.) *Casual use of Camphene and Friction Matches.*

A clause in a policy of insurance against fire, which expressly prohibits camphene or friction matches "from being deposited, used, kept, or sold in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent, in writing, on the policy, by the secretary;" and which further provides that "any violation of this prohibition shall render the policy absolutely void;" is not violated by a casual use of camphene or friction matches by the workmen employed in the building, contrary to the orders of the assured.

The use of camphene and friction matches, contemplated in such clause, must be a use by the authority, express or implied, of the assured; a known and permitted use.

If, however, the assured knew, or as prudent men ought to have known, of such use, mere orders to the contrary would not avail them; nothing short of an enforced prohibition would save the policy; and if such use was habitual, the law imputes to the assured knowledge and permission.

FINLEY et al. vs. LYCOMING COUNTY MUTUAL INSURANCE CO.² (Supreme Court, Pennsylvania, Philadelphia, 1858.) *Alienation. — Retirement of Partner.*

A condition in a policy of insurance against fire, issued to a partnership firm, that alienation of the insured property, by sale or otherwise, shall avoid the policy, applies to a transfer by one of the partners, on his withdrawal from the firm, to the remaining partner.

¹ 30 Penn. St. 299.

² 30 Penn. St. 311.

Immediate Notice of Loss. — Waiver.

STATE MUTUAL FIRE INSURANCE COMPANY vs. ARTHUR.¹
(Supreme Court, Pennsylvania, Philadelphia, 1858.) *Pleading. — Title. — Breach of Warranty. — Use of Building.*

To a declaration on a policy of insurance against fire, the defendants pleaded that the policy was made upon condition that if the interest in the property insured was a leasehold, or other interest not absolute, it must be so stated in the policy, otherwise the policy should be void, and that the interest of the plaintiff was not absolute, and was not so stated in the policy; to which the plaintiff replied, that he was, at the time of making the policy, seised of an absolute estate in the premises, to wit: of a fee simple, in right of his wife, and that his interest was well known to the defendants, and truly described to them at the making of the policy, and that the description of his interest as set forth in the policy was made by the defendants, after the same was so described to them, *without this*, that the condition mentioned in the plea was violated or broken; and the defendants rejoined, reasserting the breach of the condition. *Held*, that the rejoinder was good; the fault, if any, being in the replication.

In an action on a policy of insurance, the defendants pleaded a breach of the plaintiff's warranty, being the condition upon which the policy was made. *Held*, that it was no answer to the plea, that the defendants knew, at the time of making the policy, that the warranty was untrue in fact.

Such knowledge might relieve against a false or imperfect representation, but not against a warranty.

The materiality of the thing warranted to the risk is of no consequence. Compliance with it is a condition precedent to any recovery upon the contract.

Where a policy of insurance provided that in case the insured buildings should be used for the purpose of carrying on any trade, &c., which would in any way increase the risk, *as described in the application and survey* (unless the same should be agreed to by the insurers and indorsed in the policy), then the policy should be void, *held*, that the standard by which the risk of any other trade, &c., carried on in the insured buildings, was to be estimated, was that described in the application, and not the actual prior use of the property, as known to the insurers.

TRASK vs. STATE FIRE & MARINE INSURANCE CO.²

(Supreme Court, Pennsylvania, Pittsburg, 1858.)

Immediate Notice of Loss. — Waiver.

Where a by-law of an insurance company required that the insured should give the company *immediate* notice of any loss that occurred, and which was annexed as a condition to the policy, notice given of the loss eleven days after it occurred was too late, where no sufficient excuse was shown for the delay.

The facts that the secretary of the company received the notice without objection as to time, and gave instructions to the insured as to the form of the statement of his loss, and that an agent of the company subsequently made examinations respecting the loss, were not a waiver of the want of due and timely notice.

Where the company was discharged from liability by the want of notice in due time, responsibility for the loss would not reattach to them, without proving authority in the agents to waive the notice, or a new consideration to sustain it.

ERROR to the common pleas of Erie County.

A. N. Trask, a merchant in Albion, Erie County, Pennsyl-

¹ 30 Penn. St. 315.

² 29 Penn. St. 198.

Immediate Notice of Loss. — Waiver.

vania, on the 26th day of February, 1851, obtained a policy of insurance in the State Mutual Fire Insurance Company, at Harrisburg, on his stock of goods, for the sum of \$1,200, for one year; the property insured was destroyed by fire on the 2d day of May, 1851. Trask sent a written notice to the company on the 13th day of May, 1851, of his loss, and the defendant acknowledged the receipt of the notice on the 17th of the same month, by letter to Trask, and made no objection as to the notice not being in time, and by letter, dated May 19th, gave directions to Trask how to make out the statement of loss. The agent of the defendant, soon after the notice was given, went to Albion and investigated the cause of the fire and extent of the loss. On the 26th day of May, 1851, Trask sent to the company a particular statement of the loss, verified by oath; and on the 10th day of May, 1853, brought this suit to recover the amount of his policy.

After the evidence was closed on both sides, the court, in answer to points of the defendant, instructed the jury that the plaintiff was not entitled to recover, because he had not complied with a by-law of the company, annexed to the policy, requiring the assured to give notice of the loss "forthwith" to the secretary of the company. That the notice given in this case, ten days after the fire, was too late. That the letter of the secretary, acknowledging the receipt of the notice, making no objection on account of the delay, giving directions to the insured how to make out his statement of loss, afterwards sending an agent to examine into the origin of the fire and extent of the loss, receiving the particular statement, verified by oath, and making no objections to the time of giving the notice up to the time of the trial, was no waiver on part of the defendant. Of the ruling and decision of the court upon that point the plaintiff complains.

The opinion of the court was delivered November 3, 1857, by

LOWRIE, J. We must decide this case according to the contract law, established by the parties for the definition of the relation between them. We may modify that contract law so as to give it an equitable adaptation to unanticipated events, but we cannot establish or introduce another in its stead. Certainly it is a contract condition of the defendants' liability that they shall be immediately notified of any loss insured against; and we cannot

Insurance of Firm. — Death of Partner.

dispense with a compliance with this law unless the plaintiff shows some proper excuse for his non-compliance. We think a delay of eleven days in giving the notice is not a compliance with the contract, and that the plaintiff has presented no reasonable excuse for this.

Then, by the terms of the contract, the defendants are discharged from liability. But it is supposed that the liability may reattach, because there was a waiver of the defect in the notice by the secretary of defendants having received it without objection, and giving to plaintiff some directions about making out the statement of his loss, and in the fact that one of the defendants' agents made some examinations respecting the nature of the loss. Yet when these acts were done the defendants were free from their contract; and we not see how such acts could re-establish it, for we do not discover that the agents had authority for that, or intended to exercise it, or that there was any consideration to sustain it. 19 State Rep. 401. And these acts may be accounted for, because the plaintiff had, in his notice, set up an excuse for his delay, which the agents might have supposed would be proved; but it has not been. And besides all this, the court left it as a question of fact to the jury to decide, whether or not there had been any waiver, and were not asked to give any more particular instructions in relation to the subject.

Judgment affirmed.

STATE MUTUAL FIRE INSURANCE COMPANY *vs.* ROBERTS.¹
(Supreme Court, Pennsylvania, Pittsburg, 1858.) *Assignment.*

Where a policy of insurance against fire is assigned to a mortgagee, with the assent of the insurer, in case of a loss, the assignee can only recover where his assignor could have done so, had no assignment been made.

Such an assignment does not convert the policy into a contract of indemnity to the mortgagee; it is the interest of the mortgagor alone that is covered by it.

The assignee takes it subject to all the express stipulations contained in the policy; and he cannot recover in case of a subsequent breach of the conditions by the mortgagor; such as effecting a further insurance on the property without notice to the prior insurer.

NATHAN WOOD *vs.* RUTLAND AND ADDISON MUTUAL FIRE
INSURANCE Co.²

(Supreme Court, Vermont, January, 1859.)

Insurance of Firm. — Death of Partner.

If an insurance be effected by A. and B. as partners, upon the partnership property, A. cannot maintain an action on the policy in his own name upon proof of the death of B. But *secus*, if the company subsequently promise, expressly or by implication, to pay it.

¹ 31 Penn. St. 438.

² 31 Vermont, 552.

THE case is stated in the opinion of

ALDIS, J. Nathan Wood and Austin Johnson were partners under the firm of N. Wood & Co. By their articles of partnership, Wood had the right, upon a dissolution of their partnership, to take the goods, pay Johnson for them, and carry on the business.

On the 13th of August, 1851, the defendants executed to N. Wood & Co. a policy insuring them for six years, five hundred dollars upon grain, and twenty-five hundred dollars upon goods that might be in their store during that time. The agreement as to Wood's right upon dissolution to buy the goods and continue the business was not stated in the application, nor made known to the defendants.

In June, 1852, Johnson died, and Wood thereupon, according to the right reserved to him in the articles of partnership, bought all the interest which Johnson's estate had in the goods, and carried on the business in his own name, and thereafter bought goods on his sole account. The business was carried on in the same store, and in the same way by Wood, that it had been carried on by N. Wood & Co.

In September, 1854, the store was burned, and there was a loss upon the goods of about three thousand dollars. All of these goods, except about three hundred dollars' worth, had been purchased by Wood after the decease of Johnson.

The plaintiff insists that he can recover in this action for the loss of these subsequently purchased goods.

I. He claims this right independent of any assent or agreement by the defendants to be liable to him, and to confirm and ratify the policy to him as assignee and purchaser. He puts his right upon the ground, that by the partnership articles he had the right upon the decease of Johnson to buy the goods and carry on the business alone; that he did so, making no change that could vary or increase the risk; that the change was but a variation of relative interest, increasing the share of one partner and diminishing that of the other.

Upon the death of Johnson the plaintiff, as surviving partner, became vested with the legal title to the goods of the firm insured by the policy, and was by operation of law the legal assignee of the policy. In case of loss he alone could sue for a breach of the contract of insurance. So long as Wood continued in the care and disposition of these goods as surviving partner, we think the

Insurance of Firm. — Death of Partner.

policy continued in force as to them, notwithstanding the decease of Johnson. But it is not for these goods alone, or for a loss while managing the business of the late firm as survivor, that the plaintiff seeks to recover; but for goods bought on his own account and used in his private business.

This is not a mere change of relative interest. It is a new business, and a new party, and to make the defendants liable to Wood alone, it must be shown that they have contracted with him. A contract with Wood and Johnson cannot be transferred into a contract with Wood, without their consent. Such a change in the contract and the business, the defendants cannot be supposed to have contemplated when they issued the policy. They may have contemplated that if one partner should die during the term of the policy it should be kept in force while the survivor closed the business of the firm. That is reasonable. But it is unreasonable to extend it to a new business, and a new firm.

Hence, when one partner sells to his associates, there can be no recovery by the old firm for a subsequent loss. *Tillou v. The Kingston Mut. Ins. Co.* 1 Seld. 406; ¹ *Murdock et al. v. The Chen. Co. Ins. Co.* 2 Comst. 210; ² 3 Denio, 301.

This has sometimes been put upon the ground that at the time of the loss the old firm had no insurable interest in the property. But we think where there is a voluntary change of the firm, the insurance company may also well say that the new firm is not the party with whom they contracted. They might consider the risk increased as much by the departure of one of the assured from the firm as by the introduction of a new party; and when such a change is voluntary, it is a risk which they did not contemplate. They might be willing to insure Wood while connected in business with Johnson, and wholly unwilling to insure or deal with him alone. The rights and liabilities of Wood & Johnson might be very different from those of Wood alone. They might be solvent and he insolvent. The fact, that by the partnership articles the plaintiff had the right to purchase the stock and continue the business, upon the dissolution of the firm of Wood & Co. cannot alter the rights of these parties as to the extension of the insurance. The clause in the articles was not made known to the defendants, and therefore could not bind them. Even if known, we think it could have had no effect, unless it had been incorporated into the contract by express words.

¹ *Ante*, vol. 3, p. 238.

² *Ib.* p. 36.

Without the assent or agreement of the defendants to treat the policy as a policy to Wood alone, we do not think he can recover for these subsequently purchased goods.

II. The more important question next arises, as to the effect of the evidence excluded by the court.

The plaintiff, in his declaration, alleges the execution of the policy, the agreement in the partnership articles, the death of Johnson, the purchase of the goods by Wood, and an agreement of the defendants with Wood, that in consideration of his paying all subsequent calls upon the premium note, "the policy should enure to his benefit, and stand as a policy to him for the insurance of his sole goods and property, kept in the store and employed in the prosecution of the business," and performance by the plaintiff, relying on this promise of the defendants, whereby the defendants became liable, &c.

The evidence excluded by the court tended to prove such an agreement entered into with the plaintiff, upon full notice of all the facts, both by the agent and directors of the defendants' company. But it was not claimed that the agreement was in writing. The evidence showed that it was express, but verbal with the agent, assented to by the directors, and had been acted upon by both parties.

A policy of insurance is a mere *chose in action*, and not assignable at common law so that the assignee can sue in his own name, and though, like a bond, it may be made payable to the insured and his assigns, still, if a loss happens, the equitable assignee must sue in the name of the original assured. *Skinner v. Somes*, 14 Mass. 107; *Jessell v. Williamsburg Ins. Co.* 3 Hill, 88;¹ 7 Wend. 72; Phil. on Ins. p. 61; 9 Wend. 404.

In the charters of modern insurance companies, and usually in policies of insurance, there is a provision that a sale of the property insured shall avoid the policy; but that the vendee, having the policy assigned to him, on application to the company within some limited period of time, may have the policy ratified and confirmed to him, so that he may be substituted for the original assured, and have all his rights and liabilities. In New York it has been held that the vendee and assignee, under such a policy, must sue in his own name and not in the name of the assignor. *Mann v. The Herk. Co. Ins. Co.* 4 Hill, 188;² 1 Hill, 71.

As to the form of bringing this action, the question is not im-

¹ *Ante*, vol. 2, p. 190.

² *Ib.* p. 234.

portant in this case, for the plaintiff is both vendee and assignee, and also, as surviving partner, the only one who can sue as the original party insured. And as under our decisions he might join his individual claims with those as surviving partner (2 Vt. 569; 4 Vt. 26), the question as to who should sue does not arise. In the charter of this company, section 12, it is provided that when a house or building is alienated the policy shall be void; but that the vendee having the policy assigned him may within thirty days have it confirmed to him, &c. There is nothing in the charter as to the alienation of goods. Nor is there any provision in the charter or by-laws specifying how the policy shall be confirmed to the vendee, or that it shall be in writing. The first and second sections of the eighth article in the by-laws enable the vendor of goods insured to have his policy cancelled in whole or in part. They have no further application. As, therefore, there is nothing in the charter, or by-laws, or policy, to determine the effect of consent by the company to an alienation of his interest in the goods by one of the assured to his associate, nor how the vendee or assignee may have the policy ratified to him so as to enure to his benefit, we are obliged to recur to the general principles of the law of insurance so as to determine the point here in issue.

The general rule of the common law is, that a *chose in action* cannot be assigned, so that the assignee can sue in his own name, unless there is an express promise by the debtor, upon sufficient consideration, to pay the assignee.

It has been held in this state that the *bond fide* assignment of a debt, and notice, constitute a sufficient consideration for a promise by the debtor to pay the assignee. *Moar v. Wright*, 1 Vt. 57, contains an elaborate opinion of Judge Royce on this point. It has since been followed in this state. 7 Vt. 197; 11 Vt. 82. See, also, 18 Maine, 122; 24 Maine, 484; 4 N. H. 69; 4 Cow. 13; 3 Hill, 88; 9 Wend. 317.

In *Mowry v. Todd*, 12 Mass. 283, Parker, C. J., says: "Whatever may be the effect of handing over a written contract to a party to whom it is intended to be transferred, without a recognition of the transfer by the person bound by the contract, and a promise to pay to the holder, we are satisfied that with such recognition and promise the assignment is sufficient without the name of the assignor. It amounts to the substitution of one

creditor for another, by the consent of the two creditors and the debtor; and an action may be maintained by the assignee in his own name, founded on the assignment and the express promise to pay."

In England it has been held, that, to make the consideration sufficient, there must be something more than the assignment of the debt, such as release of another's liability, or forbearance. 4 B. & C. 163 and 166; 8 B. & C. 402 and 395.

In applying this general rule to the law of insurance, Mr. Phillips, in his *Treatise on Insurance*, pp. 61 and 62, says: "If the underwriter has agreed to account and make payment to an assignee, the latter may commence proceedings in his own name, where nothing remains to be done on the part of the assignor, and all his interest in the contract has ceased; and if the assignment, taken in connection with the policy, plainly transfers the assured's whole interest, the underwriter's *assent to it is evidently equivalent to his agreement to be directly answerable to the assignee*. In such case the suit may be in the assignee's name, and he becomes to all intents and purposes the substituted party to the contract." The 8 Mass. 515 seems to recognize the rule as thus expressed. The correctness of the rule is indisputable so far as it is founded on an express promise by the insurer to pay. Nor does it seem an unreasonable conclusion, that the assent of the insurer to the assignment and continuing validity of the policy, and to the alienation of the property where alienation avoids the policy, should be held equivalent to an express promise, since without such consent the policy would be void. The assent of the insurer in such cases is nothing unless it amounts to an express promise, for he knows that assent or agreement with one who has parted with all his insurable interest in the property insured would be null, a mere gaming policy. We think the rule expressed by Mr. Phillips is founded upon good sense and the fair analogies of the law.

The case of *Bodle v. The Chenango Co. Ins. Co.* 2 Comst. 53,¹ has been cited to show that no action at law will lie. That was a bill in equity, and the court of appeals held that it was well brought, and that the orators had no remedy at law. There, Jona Bodle sold to James Bodle an undivided interest in the goods insured, and the insurance company agreed that the policy should remain good to Jona Bodle on the store for six hundred

¹ *Ante*, vol. 2, p. 794.

dollars, and to Jona and James for fourteen hundred dollars on the goods. The charter of the company had the usual provision that the grantee having the policy assigned to him might, on application, have the same ratified so that he should be substituted for the original assured.

The case seems to have been considered only in the one view, whether the orators had complied with the provisions of the charter so that they might sue at law; and the court held that there was no assignment of the policy or any part of it by James to Jona, so as to enable them to sue as assignees under the charter. If the suit had been by James and Jona Bodle, on the express promise to pay the fourteen hundred dollars to them, and had set forth their application to have the policy continued and ratified to them, and the agreement of the company to do so, and the entry of Jona Bodle's name as a member, we think a sufficient consideration and valid contract would have been shown so as to have sustained the action at law. But this view of the case does not seem to have been presented.

In the case at bar, Wood, by the decease of Johnson, became the legal assignee of the policy, and had the sole care and disposition of the property insured. He purchased the beneficial interest which Johnson's estate had in the goods, and thus became the legal owner of both the goods and the policy. Johnson's estate had nothing in either. Being thus the legal assignee of the policy and vendee of Johnson's interest in the goods, he applied to the general agent of the company to ratify and continue the policy to him alone, and for his sole goods, during the period for which the policy by its terms was to continue. The agent did expressly agree to this proposition. If he had authority to so agree, he thereby bound the company. But whether he had or had not we do not consider material, for the case states that the directors, with notice of the death of Johnson and that the plaintiff was continuing the business, assented to this agreement, and treated the policy as so continuing. The agent had authority to receive the proposal of the plaintiff, and if not authorized to accept it, it was his duty to communicate with the directors. As the plaintiff had no communication with the principals, but did the whole business through the agent, he could not be expected to have proof of an express assent by them. If they treated the agreement he had expressly made with the agent as valid,

Insurance of Firm. — Death of Partner.

and acted upon it for more than two years and up to the time of the loss, we think such conduct a sufficient ratification of the agreement, and fully sufficient to support and confirm it, although no direct and express language of affirmance is shown. Circumstantial evidence, which establishes such assent to the agreement, has all the force of a positive agreement in words. Assent that the policy should continue in force for Wood's sole benefit, excludes all idea of its continuance for the benefit of Wood & Johnson. Johnson being dead, and the policy and the goods being vested in Wood, an assent that the policy should continue in force for his sole benefit must be deemed equivalent to an express promise to pay him the insurance money in case of loss.

Indeed this may be considered not so much an assignment of a *chose in action* as a ratification of the policy, upon sufficient consideration by the insurer to the plaintiff as the party insured; the plaintiff thereafter holding the policy not by assignment, but as a party substituted by contract, upon sufficient consideration, for the original party. It was not necessary that the substitution should be pursuant to the provisions of the twelfth section, for that applied only to buildings, and not to the alienation of goods. The agreement of the plaintiff to remain liable on the premium note was a sufficient consideration.

It is objected also by the defendants, that such a substitution or assignment cannot be by parol, but must be in writing.

Then there is nothing in the charter, by-laws, or policy, requiring the assent of the company to such substitution to be in writing.

It is well settled that the promise to assume a *chose in action*, made by the debtor to the assignee, enabling the latter to sue in his own name, need not be in writing. 3 B. & C. 842; Chitty on Cont. 532, and notes.

This cannot be deemed the creation of a new contract of insurance by parol evidence, but only the ratification and confirmation of an existing policy to a new party having an interest in the subject matter of the insurance. Though such confirmations are by many insurance companies required by charter or by-laws to be in writing, yet it is obvious that in the absence of any statute requiring such act to be done only by writing, parol evidence that it has been done and acted upon is admissible. *Goodall v.*

Amount of Recovery.

N. E. M. F. Ins. Co. 5 Fost. 169; *Perch v. New Lon. Co. Mut. Ins. Co.* 22 Conn. 575.

We do not deem it necessary to consider the question whether an oral contract of insurance, when it has been acted upon, is binding between the parties.

As the evidence offered was admissible as tending to prove an express promise, or what was equivalent to it, a new trial must be had.

Judgment reversed.

As to transfers of partnership interests between partners, see *Dix v. Mercantile Ins. Co.*, *ante*, and cases cited.

GOODFELLOW vs. TIMES AND BEACON ASSURANCE CO.¹
(Queen's Bench, Upper Canada, Hilary Term, 1859.) *Construction of Receipt.*

A receipt ran in the following form: "The Times & Beacon Assurance Company Agents' Office, Brantford, 3d of February, 1858. Received from Messrs. J. Goodfellow & Co. the sum of \$14, being the premium for an insurance to the extent of \$2,000 on property described in the order of this date, *subject to the approval of the board at Kingston*, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved, a policy will be delivered, otherwise the amount received will be refunded, *less the premium for the time so insured.*" *Held*, not an absolute insurance for twenty-one days certain, but that the company might within that period reject the risk, and give notice, after which their liability would cease. BURNS, J., dissenting.

LONDON AND NORTH WESTERN RAILWAY CO. vs. GLYN.²
(Queen's Bench, England, Hilary Vacation, 1859.)

Amount of Recovery.

Plaintiffs, common carriers, insured goods against fire in an insurance company of which defendant was treasurer. By a condition indorsed on the policy, "goods held in trust or on commission" were "to be insured as such, otherwise the policy" would "not extend to cover such property." By the policy, £15,000 was declared to be insured "on goods their" (plaintiffs') "own and in trust as carriers" in a certain warehouse; and it was stipulated that the funds of the insurance company were to be "liable to pay, reinstate, or make good" "to the" "assured" "all damage and loss which the" "assured" should "suffer by fire, on the property" therein "particularized." Another of the conditions indorsed ran thus: "In every case of loss duly proved, the company will either reinstate the property, or the assured shall receive satisfaction to the amount thereof, without discount or deduction." *Held*, in an action on the policy, that, to the named amount, the whole value of goods in the warehouse, in plaintiffs' possession as carriers, was insured by it, and not merely plaintiffs' interest as carriers in such goods. That plaintiffs were entitled to recover the whole value of such goods destroyed by fire in the warehouse; although as the value of such goods exceeded £10, and the owners had not declared such value to plaintiffs, plaintiffs were not liable to the owners for such loss by reason of the Carriers' Act, stat. 11 G. 4 and 1 W. 4, c. 68, § 2.

¹ 17 Up. Can. Q. B. 411.

² 1 E. & E. 652.

Amount of Recovery.

Held, further, that plaintiffs would be trustees for the owners of the goods of the amount thus recovered, less plaintiffs' charge as carriers in respect of the goods.

ACTION by plaintiffs against defendant, as treasurer of the Globe Insurance Company. The declaration set out at length a policy of insurance against loss and damage by fire, effected with the said insurance company, dated 11th December, 1854, by which the sum of £15,000 was insured on goods, plaintiffs' own and in trust as carriers, in a certain warehouse, in the policy named. The declaration then averred that certain goods of plaintiffs, in trust as carriers, in the said warehouse, had been burnt and destroyed by fire, whereby plaintiffs sustained a loss on the said goods to the amount of £15,000, and that the said insurance company had not paid or made good the said loss.

2d plea: That plaintiffs did not, by reason of the said burning and destroying by fire, suffer any damage or loss upon the said goods. Issue thereon.

At the trial before Willes, J., at the Surrey summer assizes, 1858, a verdict was entered for the plaintiffs for the full amount claimed, subject to the opinion of the court upon a special case, which was substantially as follows:—

By the policy of insurance, upon which this action was brought (a copy of which formed part of the case), an insurance was, on 11th December, 1854, effected by plaintiffs with the Globe Insurance Company for the sum of £35,000, £15,000 of which was declared to be "on goods their" (plaintiffs') "own and in trust as carriers," in a warehouse (A.) belonging to plaintiffs, situate at the Camden Town Station of the London and North Western Railway.

The second condition indorsed on the policy was as follows:—

"Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not extend to cover such property."

It was declared in and by the policy that, during the continuance of the policy, "the capital stock or fund of the insurance" company shall be subject and liable to pay, reinstate, or make good, at their option, to the "assured," "all damage and loss which the" "assured" "shall suffer by fire on the property herein particularized, not exceeding on each item the sum herein before declared to be insured thereon."

And the fifteenth condition indorsed was as follows :—

“In every case of loss, duly proved, the company will either reinstate the property, or the assured shall receive satisfaction to the amount thereof, without discount or deduction.”

The policy continued in force up to and on June 9, 1857, when the warehouse (A.) and nearly all the goods then contained in it were consumed and wholly destroyed by an accidental fire. All claims upon the policy have been settled and adjusted, except those in respect of the £15,000 insured on goods their own and in trust as carriers, in warehouse (A.) as above mentioned.

At the time of the happening of the fire the warehouse contained a large quantity of goods, which, for the purpose of this case, are to be taken to be goods of plaintiffs, in trust as carriers, within the meaning of the policy. These goods were wholly burnt and destroyed by the fire.

Plaintiffs seek to recover in this action the value of the last mentioned goods. It has been agreed that the rights and liabilities of plaintiffs and the Globe Insurance Company shall be raised and determined upon two selected items of the said goods, representing two classes into which the whole of the said goods are divisible, and that the claims of the plaintiffs against the Globe Insurance Company, in respect of the rest of the said goods, shall be adjusted out of court, on the principles which may be applied by the court to the said two selected items respectively.¹

Plaintiffs were, from a time prior to 1847, and have ever since continued to be, common carriers of goods by railway, and as such have, during all that time, carried goods over the London and North Western Railway (among other places), from London to Edinburgh. The Camden Town Station, mentioned above, is the terminal goods station of plaintiffs in London.

On 9th June, 1857, a package of silk, of the value of £10 and upwards, was received in London by Pickford & Co. (as agents for plaintiffs), to be carried by plaintiffs from London to Edinburgh.

These silks were contained in one package, and the value and nature of such silks were not, at the time of the delivery thereof to Pickford & Co., declared by the person sending or delivering the same, nor was any increased charge, or agreement to pay the same, accepted by the person receiving such package.

¹ The argument turned on one only of other being conceded by the defendant ; the two selected items, the claim as to the facts relating to it are here omitted.

Amount of Recovery.

This parcel was deposited by Pickford & Co. in warehouse (A.) preparatory to its being dispatched to its destination, and remained there until it was burnt and destroyed by the fire.

Pickford & Co., after the fire and before this action, with the authority and on behalf of the plaintiffs, paid to the consignee of the said silks part of the value thereof, which was accepted by the latter in discharge of his claim against plaintiffs in respect of the said silks.

The court was to have power to draw all inferences of fact.

The questions for the opinion of the court were :¹

2. Whether, having regard to the provisions of the Carriers' Act, 11 G. 4 and 1 W. 4, c. 68, plaintiffs were entitled to recover the value of the silks, or the amount so paid in respect of them as aforesaid.

If the court should be of opinion that plaintiffs were entitled to recover in respect of both or either of the selected items, the verdict for plaintiffs was to stand, subject to the adjustment of the amount, as before mentioned, in accordance with the principles laid down by the court.

If the court should be of opinion that plaintiffs were not entitled to recover in respect of either of the selected items, the verdict entered for plaintiffs was to be vacated, and a verdict entered for defendant.

WIGHTMAN, J. The question in this case is, whether the plaintiffs are entitled, under this policy, to recover more than their own particular interest in the goods which they, as carriers, had in the warehouse when it was burnt? I think that they are, and that they ought to recover the full value of the goods. They must, in my opinion, be considered as having insured the goods which they held in trust as carriers, for the benefit of the owners, for whom they will hold the amount recovered as trustees, after deducting what is due in respect of their own charges upon the goods. It is not contended that there is anything illegal in this policy. The plaintiffs are clearly entitled to recover something: the only question is, how much. Now, when the terms of the policy are looked at, it appears that the plaintiffs thereby insure "goods their own and in trust as carriers," in the warehouse. Thus a distinction is drawn between their own goods and goods

¹ The first question, which turned upon notice of insurance with any other company, was not raised upon the argument.

which, as carriers, they hold for other people ; and it appears to me that both classes of goods were meant to be fully covered by the insurance, and that the description of some of the goods as "goods in trust as carriers" was inserted in compliance with the second condition indorsed on the policy, for the express purpose of protecting the interest of the owners of such goods, as well as the more limited interest of the plaintiffs. It is true that this insurance is in the nature of a voluntary trust undertaken by the plaintiffs, without the knowledge of the *cestuis que trust*, the owners of the goods ; but it is a trust clearly binding on the plaintiffs in equity, who will hold the amount which they now recover, in the first place for the satisfaction of their own claims, and in the next, as to the residue, in trust for the owners. If a different construction was put on such a policy as this, it would be necessary, as my brother Crompton has observed, that several policies should be effected on the same goods, and thus insurance companies would obtain several premiums instead of one in respect of what, to them, is the same risk. The question is certainly one of intention ; but I have no doubt that the intention was as I have stated. The circumstance that the plaintiffs, in consequence of the non-compliance with the carriers' act, are not liable, as carriers, to the owners for the loss of the goods, is not, as it seems to me, very material to the present question. In *Waters v. The Monarch Insurance Co.* 5 E. & B. 870, the plaintiffs, being warehousemen, and therefore not insurers, were not liable to the owners of the goods which were burnt ; but the court held that that fact did not prevent the insurance company from being liable to the plaintiffs to the amount of the full value of the goods, although the utmost interest that the plaintiffs themselves had in the goods was to the extent of their warehouse charges, for which they had a lien upon them: That case is, in principle, undistinguishable from the present, and is conclusive in favor of the plaintiffs.

ERLE, J. I do not disagree with the rest of the court as to the construction to be put upon the policy in this particular case. I should have been inclined to think that the intention of the assured was to insure only their own interest : but then, as a carrier is responsible to the owner for the full value of goods destroyed by fire, his insurance of his own interest is an insurance of the full value of the goods. And in this particular case, I do

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not think that it can be said that, in making this insurance, the plaintiffs made an implied stipulation with the insurance company, that, although they insured the whole value of all goods in their hands as carriers, they would, if the Carriers' Act, 11 G. 4 and 1 W. 4, c. 68, gave them a defence against the claim of the owners of any such goods, if lost, avail themselves of it. And here we have it found as a fact, that the plaintiffs have made a payment to the owners of the goods in question, in respect of the loss. In future, if insurance companies wish, in granting such policies as the present, to limit their responsibility to the responsibility of the carrier, upon proceedings taken against him *in invitum*, they must employ precise words to that effect.

CROMPTON, J. I am of the same opinion. The plaintiffs intended to insure, first, their own interest, if any, in the goods; and, secondly, the interest of their *cestuis que trust*, the owners of the goods. Mr. Lloyd said that the questions were, Who are the assured? and, What is their loss? I answer, first, the assured are the plaintiffs, both as trustees and as carriers; secondly, the loss is the loss of the property as trust property, that is to say, as property in which the plaintiffs are beneficially interested to the extent of their lien, and as to the residue of which they are trustees for the true owners. I should come to no other conclusion if the question was *res integra*; but it is not, having already been decided in *Waters v. The Monarch Insurance Co.* That case established that persons who, like the plaintiff here, are the bailees of goods, having an insurable interest in them, as against the assurers, to their full value, although the assured may be trustees for third persons of part of the amount recovered on the policy. Then we have to consider whether the plaintiffs here have sufficiently complied with the second condition on the policy, which says that "goods held in trust or on commission are to be insured as such." I read that as meaning, "If you intend to insure as trustees, and not as absolute owners, you must give us notice of that fact." The condition proceeds, "otherwise the policy will not extend to cover such property." Mr. Lloyd says that that means "will not extend to cover *your particular interest* in such property." But I think it means, "the value of such property shall not be recoverable unless you specify it as trust property; but if you do, its entire value shall be recoverable." I think, too, that, notwithstanding this condition, an insurance

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simply upon "goods" would have covered the plaintiffs' interest as carriers in the goods. Then the policy itself is expressed to be made upon "goods their" (the plaintiffs') "own, and in trust as carriers;" so that the condition is complied with. There can be no objection to the plaintiffs' recovering the full value of the goods; for an equity will arise, in favor of the owners, from the mere circumstance that the plaintiffs will have received more than enough to cover their own interest; as to the excess above the sum which will cover that interest, the plaintiffs will be compellable, in equity, to pay it over to the owner. The fact that the plaintiffs, in consequence of non-compliance with the provisions, as to notice, of the carriers' act, were not liable to the owners for the loss of the goods, does not, in my judgment, at all affect the case. The owners may fairly have chosen, knowing that an insurance had been effected by the plaintiffs, to look to the insurance office for compensation instead of to the plaintiffs. I do not see that there is any *obligation*, under the act, upon the owners of goods above the value of £10, to declare their value to the carrier; if they are willing to run the risk of the loss of the goods, without having any redress against the carrier, they may do so. But there is no hardship in holding the insurance office liable to the full value of the goods, for they have received the premium upon the full value.

HILL, J. I am of the same opinion. The question is one of construction of the policy. Does it protect the interest and legal responsibility of the plaintiffs, as carriers only, or does it also protect the interest of the owners in the case of goods in their possession as carriers? The latter appears to me to be the proper construction. The policy contains plain words, describing the property insured, "Goods their own, and in trust as carriers." If it had been intended that only the plaintiffs' own goods should be insured, why should the further words have been added? Mr. Lloyd relied on the second condition as making it necessary for the plaintiffs to add these words in order to insure merely their interest as carriers. But that condition is, "Goods held in trust or on commission are to be insured as such, otherwise the policy will not extend to cover such property." I agree with my brother Crompton, that this condition would not have prevented the plaintiffs from recovering on the policy to the extent of their interest as carriers, had they intended to insure only that interest,

Combustible Materials. — Unanswered Questions.

and, with that intention, had made the insurance simply upon "goods," without adding the words "in trust." The effect to be given to these words, which have been added, is that the owners' interest was insured as well as that of the plaintiffs. My brother Erle has most truly said that insurance companies must insert in policies express words to that effect, if they wish to limit their liability in the manner here contended for. To hold that they have done so would be to put a most strained construction on the language which has been used. Moreover, I consider that *Waters v. The Monarch Insurance Co.* 5 E. & B. 870, really governs the present case. The *ratio decidendi* was the same.

Judgment for the plaintiffs.

GRENIER vs. THE MONARCH FIRE & LIFE ASSURANCE CO.¹
(Superior Court, Montreal, February, 1859.) *Forfeiture. — Evic-
dence.*

Under a clause in a policy of insurance, that if there appear fraud in the claim made to a loss, or false swearing or affirmation in support thereof, the claimant shall forfeit all benefit under such policy, the court will reject the claim of the policy holder, if the company establish that the claim is unjust and fraudulent, and far in excess of the actual loss to the knowledge of the policy holder.

General evidence may outweigh the positive testimony of witnesses, where the evidence of these witnesses is not consistent, and where the presumptions are adduced against its truth.

JOHN J. HALEY vs. DORCHESTER MUTUAL FIRE INSURANCE CO.²

(Supreme Court, Massachusetts, March Term, 1859.)

Combustible Materials. — Unanswered Questions.

A policy of insurance on "stock in trade, being mostly chamber furniture in sets and other articles usually kept by furniture dealers," based on an application, which is made part of the contract, for insurance on "household furniture, being my stock in trade, mostly chamber furniture in sets," covers paints and varnish used to finish the furniture, if usually kept by furniture dealers; even if the by-laws to which the policy is made subject provide that the application shall be approved by two directors; and is not avoided by having on the premises as much varnish as is usually kept by furniture dealers, although it is an inflammable substance, and the insured, in answer to a question in the application, whether any explosive or highly inflammable matter was kept near or in the premises, answered, "Not to my knowledge."

In an application for insurance, which provided that questions not answered should be construed most favorably to the risk, the applicant left unanswered a question whether there was any livery stable in the vicinity. In an action on the policy of which this application was made part, the jury were instructed that if there was a livery stable in the vicinity at the time of the application, they were to determine what was the meaning of the question and of the word "vicinity;" and whether there was a livery stable in that

¹ 3 L. Can. Jur. 100.

² 12 Gray, 545.

Combustible Materials. — Unanswered Questions.

vicinity, having reference to the situation of the building in which the property insured was situated, the situation of other buildings, and the locality, as ascertained from the contract and evidence. *Held*, that the defendants had no ground of exception.

In an application, made part of a policy of insurance on property in the second story of a large building, and providing that the description therein given is a full and true description of the property to be insured and of all circumstances in relation thereto, material to the risk, and that the questions not answered shall be construed most favorably to the risk, an omission in answer to the question, "Who occupied it?" to state the occupation and occupants of all the rooms, does not avoid the policy, if the jury are satisfied that those not disclosed make the risk less hazardous than it would have been if the whole building had been occupied as stated in the answer.

Under a policy of insurance for \$2,000 on property insured elsewhere for \$3,000, which provides that "when property is insured by this company solely, three fourths only of the value will be taken, and in case of loss this company will be liable to pay three fourths only of the value at the time of the loss," and that, "in case of loss or damage of property upon which double insurance subsists, the company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon, such amount not to exceed three fourths of the actual value of the property at the time of the loss," the underwriters are not liable for more than two fifths of three fourths of the value of the property.

ACTION OF CONTRACT upon a policy by which the plaintiff was insured "against loss or damage by fire, under the conditions and limitations expressed in the by-laws" of the defendants, annexed to the policy, on his "stock in trade, being mostly chamber furniture in sets and other articles usually kept by furniture dealers, contained in the second story of the building known as Gerrish Market, in the city of Boston, on Portland Street, corner of Sudbury Street, \$2,000; and other insurance of \$3,000 subsists; with liberty to have and make further insurance to an amount being not more than three fourths of the value of the property described in the application of the said insured dated the thirtieth day of October, 1855, which application is lodged with the secretary of this company, and shall form part of the contract to be taken in connection with this policy."

Among the by-laws annexed were the following: Art. 1. "The object of this corporation is to insure such dwelling-houses and other buildings, with their contents and such, personal property as shall not be generally considered extra hazardous, and to insure upon those only which are ordinarily considered as first class risks." Art. 2. "The company may make insurance for the term of five years; but a greater amount than three thousand dollars shall not be taken on any one risk, or on separate risks where the buildings or property are so situated as to render the same in effect equivalent to a single risk. When property is insured by this company solely, three fourths only of the value

will be taken, and in cases of loss this company will be liable to pay three fourths only of the value at the time of the loss, but in no case more than is insured by this company. But in case of partial losses on real estate, this company will pay the full amount." Art. 8. "In case any other insurance, prior or subsequent, shall subsist upon property insured by this company, the policy issued by this company shall be deemed and become void, unless such other insurance subsists with the consent of the directors, signified by a statement thereof in the policy, or by indorsement thereon, signed by the secretary; and in case of loss or damage of property upon which such authorized double insurance subsists, this company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon, such amount not to exceed three fourths of the actual value of the property at the time of the loss." Art. 16. "Unless the applicant for insurance shall make a true representation in writing of the property on which he requests insurance, and of his title and interest therein, of its situation, and of all other matters materially affecting the risk, also all incumbrances, the policy shall be void." Art. 24. "All applications shall be approved by two directors, and no director shall approve an application for insurance on property in which he is in any way interested."

The application was for insurance "on household furniture in the second story of the Gerrish Market, being my stock in trade, mostly chamber furniture in sets;" and provided that "all the questions must be answered," and that "the answers to the following interrogatories shall form the basis of the contract for insurance, and the applicant warrants them to be entirely true, and will be bound by them." "8. Is cotton waste, or any explosive or highly inflammable matter kept near or in the premises on which this insurance is applied for?" Answer. "Not to my knowledge." "11. Are there any other circumstances material to the risk: if so, what are they? If there be a livery stable or steam-engine in the vicinity, state how near to the risk." Answer. "There is a small steam-engine in the fourth story." "14. Who owns the building to be insured, or which contains the property to be insured?" Answer. "George W. Gerrish." "15. Who occupies it?" Answer. "Market-stall men; self; White & Co., polishers; Barnard & Dillingham, painters; San-

born, Carter & Bazin, bookbinders ; and one ornamental do." And " the said applicant hereby covenants and agrees with the said company that the description is a full and true description herein given of the property to be insured and of all circumstances in relation thereto, material to the risk, and that the estimated valuation shall not be conclusive upon the company ; but in case of loss the true value at the time of loss may be inquired into and ascertained ; the questions not answered above shall be construed most favorably to the risk ; and that said applicant shall be bound by the provisions of the constitution and by-laws annexed to the policy, and all laws of the Commonwealth of Massachusetts, in relation to the premises, as a part of this contract for insurance."

At the trial in the superior court of Suffolk at May term, 1857, before Huntington, J., it appeared that the Gerrish Market building was a very large building, in which a great variety of business was carried on under a great number of tenants ; that, from the time of the application for insurance to that of the fire, the premises occupied by the plaintiff consisted of a large hall or salesroom and three rooms adjoining, a paint room, varnish room, and store or packing room ; the furniture was made at another establishment or manufactory, sent up to the salesroom " in the white " or unpainted, and varnished, painted, and trimmed in the rooms adjoining the salesroom ; and a quantity of varnish, oils, and paint was kept in the premises for use in finishing the furniture. There was no evidence of any intention on the part of the plaintiffs to conceal or neglect to make inquiries about the occupation. The whole stock was consumed by fire on the 12th of April, 1856.

There was evidence tending to show that it was usual for furniture dealers in Boston to keep varnish as part of their stock, and that varnish was a highly combustible matter. The plaintiff introduced evidence tending to show that varnish kept in casks was not a combustible or highly inflammable material, and also that some furniture dealers sold some furniture " in the white " to other dealers, to be painted, varnished, and sold by them.

The defendants objected that the policy covered only the stock of furniture finished, and did not extend to the paints or varnish or any other articles ; and introduced evidence that several of

the answers in the application were not true, and that some questions were not fully answered, and others not answered at all.

The judge ruled "that the contract of insurance covered the furniture of a furniture dealer, and such other articles as were proved to be usually kept by furniture dealers, and necessary to the pursuit of the plaintiff's business; and that it was not confined to household furniture, mostly chamber furniture in sets, as the defendants contended, but might include the other articles usually kept by furniture dealers, as stated in the body of the policy: That in order to recover for the varnish and oil destroyed, the plaintiff must show that such articles were usually kept by furniture dealers; that the jury were to inquire to what amount they were usually kept; and that the plaintiff would not be entitled to recover more in value than the usual amount, taking into consideration the nature and extent of the plaintiff's business and the quantity of furniture on hand: That the declarations, representations, and statements in the application, so far as they related to the risk, were warranties, and no matter whether material or immaterial to the risk, if untrue, whether from design, ignorance, or mistake, it would be fatal to a recovery, by the plaintiff; that they were made the basis of the contract, and were to be construed according to their true spirit and real meaning; that they were to be read fairly and not captiously: That so far as no answers were given to questions in the application, they might find that the company waived such answers, but that the company must have the benefit of the provision in the contract that such omission should be construed most favorably to the risk; and if there was any material concealment, or concealment of a material fact, it would avoid the policy: That as to the answers given to specific questions, the meaning of the language as to both was to be determined by common use and acceptance, and by all the other provisions of the contract touching the same subject matter, and by the different answers themselves; that if a misstatement could have no possible relation to the risk, it would not affect the policy; that the clause as to explosive substances would not be violated in having on hand so much varnish and oil as were necessary in carrying on the business of a furniture dealer, and in such quantities as were usually kept, under the former limitations; and that the jury, in determining whether this question was answered truly, might refer to

the answers made to another question as to the occupation of the building; and that as to the answer relating to the livery stables, the jury were to inquire whether it was proved that there was a livery stable in the vicinity at the time of the application; (the plaintiff contending that the evidence did not apply to that time but to a subsequent period;) and that if it was so proved, they were to determine what was the meaning of the question, and of the word 'vicinity,' and whether there was a livery stable in that vicinity, having reference to the situation of the building in which the property was situated, the situation of other buildings, and the locality, as ascertained from the contract and evidence." As to the question in regard to the occupation of the building, there being evidence tending to show that at the time of the application there were occupants in one or two rooms of the building not named in the answer, besides the general instructions given, the jury were also instructed, "that if there were such occupants, not mentioned in the answer, the omission would not necessarily avoid the policy, if the jury were satisfied that by such occupation the risk was less hazardous than it would have been if the occupation and occupants were all such as stated in the answer, and that the purpose of the inquiry was to be borne in mind."

On the question of damages, the jury were instructed, "that the defendants were liable, if at all, for such proportion of the loss or damage as the sum insured by them bears to the whole amount insured on the property, subject to double insurance, not exceeding three fourths of the actual value; taking care, however, that the plaintiff should not recover in any event more than three fourths of the value of the property covered by insurance, with interest after ninety days from notice of loss."

The jury returned a verdict for the sum of \$2,106.67, and found under directions of the court, specially, the value of the property insured to be \$5,917.25. The amount of the whole insurance was agreed to be \$5,000. The defendants alleged exceptions.

BIGELOW, J. The instructions to the jury were carefully guarded and sufficiently favorable to the defendants, with the exception of that which relates to the subject of damages. This was founded on what seems to us to be a misinterpretation of the by-laws. The defendants did not assume a liability in case of

the existence of other insurance on the property to be ascertained solely by calculating the proportion what the sum insured by them bore to the whole amount insured on the property. The basis of calculation was in all cases to be the value of the property insured after deducting one fourth of such value. Of this sum the defendants were to pay such proportion as the sum insured by the policy issued by them should bear to the whole sum insured by all the policies existing on the property at the time of the loss. In other words, the defendants were to be liable only for their proportion of three fourths of the value of the property insured; and this proportion was to be ascertained by calculating the ratio which the sum insured in the policy declared on bore to the whole sum insured by all the policies existing on the property. This, if the whole property at the time of the loss amounted to ten thousand dollars, the sum on which the liability of the defendants must be reckoned would be three fourths of ten thousand, or seven thousand five hundred dollars; and of this last sum the defendants could be held to pay only the proportion which the amount insured by them, viz: two thousand dollars, bore to the whole sum insured, viz: five thousand dollars; or two fifths of seven thousand five hundred dollars, which would be three thousand dollars. But as this last sum exceeds the whole amount insured by the defendants, it would be cut down to that amount, and the plaintiff could recover only two thousand dollars. This is the clear result of an analysis of the provisions of the by-laws. The second by-law is limited to cases where the defendants are sole insurers on the property. It limits their liability in the first place to three fourths of the value of the property, as stated in the policy; and in the next place it provides for a further limitation by cutting down the amount to which the plaintiff would be entitled to three fourths of the value of the property at the time of the loss, if that happens to be less than the amount stated in the policy. Then comes the eighth by-law, which provides for the case of double insurance. By this it is stipulated that the defendants shall be liable to pay only such proportion of the loss "as the sum insured by this company bears to the whole amount insured thereon, such amount not to exceed three fourths of the actual value of the property at the time of loss;" that is, the amount insured by the defendants and all other insurers, for the purpose of ascertaining the extent of the defendants' liability, is

not to be allowed to exceed three fourths of the value of the property at the time the loss occurs. The purpose of this provision is obvious. It is to carry into effect the provisions of Rev. Sts. c. 37, § 28, which enact that mutual fire insurance companies shall not insure property for a sum exceeding three fourths of its value. The effect of the eighth by-law is, that in ascertaining the liability of the defendants on a policy issued by them, in cases where there is other insurance, the property is to be taken at three fourths of its value, and the proportion which the defendants are to pay is to be reckoned on that basis.

It is suggested by the counsel for the plaintiff, that the effect of this interpretation of the by-laws is to restrict the plaintiff from obtaining insurance on his property by other insurances for a sum greater than three fourths of its value. But this is an error. The purpose and effect of the by-laws are only to require that, in calculating the liability of the defendants according to the agreed proportion, it is to be assumed that the property was insured only for three fourths of its value.

Inasmuch as the instruction on the subject of damages did not conform to this view of the liability of the defendants, there must be a new trial on the question of damages; and for this purpose only the order is to be

Exceptions sustained.

Upon a new trial, it appearing that part of the property insured by the defendants was not covered by the other insurance, it was held that the plaintiff might recover three fourths of the value of that part of the property, and three fourths of the value of so much as was covered by the other insurance, not exceeding \$2,000 in all. 1 Allen, 536. Dewey, J., now delivered the following opinion: In prescribing the rule for the assessment of damages in the present case, it is necessary to consider the effect to be given to the 17th interrogatory in the application for insurance, and the answers thereto, and also to the clause in the policy as to other insurance. In consequence of these statements in the application and policy as to other insurance, the defendants insist that, under art. 8, of their by-laws, they are liable to pay only such proportion of the loss as the sum insured by them bears to the whole amount insured thereon, taking

the same as stated, on the face of the policy. That the two policies of \$1,500 each, held by the assured, did not in fact cover all the property lost by the peril insured against it, seems to us quite clear. Those policies are merely on his "stock of furniture," and would not include the loss of \$826.84 on paints, oil, and varnish. The policy executed by the defendants has a broader scope, being on "his stock in trade, being mostly chamber furniture in sets, and other articles usually kept by furniture dealers." To the extent of the articles above named there is not therefore a double insurance, and the rule of proportionate assessment of the loss among various insurers of the same property cannot apply; and, as to these articles, no remuneration can be claimed except of the defendants.

But it is urged on the part of the defendants that by the recitals in the application and in the policy, the plaintiff

Combustible Materials. — Unanswered Questions.

is estopped from showing these facts, or taking the position that there was not other insurance to the amount of \$3,000 upon all the property covered by their insurance. We do not understand that it is alleged that any false representations were fraudulently made as to other insurance, but that, whether this discrepancy may have been inadvertent and unknown to the assured at the time, or otherwise, he can recover no more than the proportional share which would have been recoverable had there been outstanding policies on the entire stock of goods destroyed by the fire.

This leads to the inquiry as to the character of such recitals as to other insurance existing on the property upon which insurance is asked. This subject was somewhat considered in the case of *Forbush v. Western Massachusetts Ins. Company*, 4 Gray, 337.¹ That case presented the more limited question of the effect to be given to such recitals of insurance elsewhere, in cases where it was literally true at the time of issuing the policy, but ceased to be so long before the loss occurred, or the expiration of the period of the policy under which the plaintiffs claimed to recover the loss. That such representation was not to be taken to be a warranty or stipulation that there should be a good and valid insurance to the amount stated as insured in other companies during the entire continuance of the new policy, was fully settled in that case. If it is not to have that effect, but, on the contrary, would be fully satisfied by the fact of the actual existence of such insurance for a single day, then it would seem that the only ground for avoiding a policy for erroneously stating the amount of policies held in other companies would be that of a fraudulent misrepresentation.

If the parties intend to limit the liability of the insurers in the new policy to a certain proportion of the loss, to be fixed by the enumeration of certain other outstanding policies, the stipulation should

be directly made, that such other insurance is to be continued to some future definite period. In the case of *Forbush v. Western Massachusetts Ins. Company*, although on the face of the policy it was recited that \$2,000 was insured at the People's Mutual Company in Worcester, yet it was an insurance that in fact ceased to be valid at the very moment when the policy made by the defendants took effect; yet this fact was held not to diminish the liabilities of the insurers under the new policy to pay the whole loss.

Independent of any purpose of inserting the amount of other policies, with a view to limit absolutely the liability of the insurers in the new policy to a mere proportional part of any loss that may occur, there are other sufficient reasons for thus stating it on the face of the policy. By section 8 of the by-laws, such new policy is declared to be void, "unless such other insurance subsists with the consent of the directors, signified by a statement thereof in the policy, or by indorsement thereon signed by the secretary." So also, where in fact such other policy does exist at the time of the loss, it would diminish the liability to a proportional part of the amount of the loss. Both these objects are effected by an insertion of the amount of other insurances, and without giving to them the effect of a warranty as to other insurance named in the policy. Beyond this, in the absence of all suggestion of fraudulent misrepresentations, we are of opinion that a recital like that in the present case should not affect the party insured, although some portion of the property insured should be found not to have been embraced in any other policy. The case of *Denny v. Conway Ins. Co.* 13 Gray, 492, did not present this question for adjudication, and the point was not there decided, though made the subject of some remarks in the opinion given in that case.

Judgment for the plaintiff on the verdict.

¹ *Ante*, p. 28.

Proofs of Loss. — Statement of Interest.

SHAWMUT SUGAR REFINING CO. vs. PEOPLE'S MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, March Term, 1859.)

Proofs of Loss. — Statement of Interest.

On a policy of insurance against fire, providing that the loss shall be paid within sixty days after notice and proof thereof according to the conditions annexed to the policy, which require such proof to include a statement of the interest of the assured in the property, the assured, if he omits to insert such a statement in his proof of loss, cannot maintain an action, unless the omission is waived by the officers of the company.

ACTION of contract against a mutual fire insurance company established at Worcester, upon a policy whereby they insured the plaintiffs for one year from the 28th of September, 1855, "against loss or damage by fire to the amount of twenty-five hundred dollars, to wit, \$1,250 on sugar in process of refining, and \$1,250 on machinery," contained in their building in Dedham; "the said loss or damage to be estimated according to the true and actual value of the property at the time the same shall happen, and to be paid within sixty days after notice and proof thereof made by the assured in conformity to the conditions annexed to this policy;" and "this policy is made and accepted in reference to the conditions hereunto annexed, which make a part of this policy, and are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

The material parts of those conditions were as follows: 4. "No agent of this company is authorized to do any act whatever which shall in any way or manner change or alter the terms or conditions of any policy issued by this company." 10. "All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the secretary of the company in writing; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation;" and "also declare, on oath, whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein;" "and when and where the fire originated, so far as they know or believe." "They shall also procure the certificate under the hand of a mag-

¹ 12 Gray, 535.

Proofs of Loss. — Statement of Interest.

istrate or notary public " as to the origin of the fire, the value of the property destroyed, and his knowledge or belief that the assured has sustained, without fraud, loss and damage by such fire to the amount therein mentioned. "And until such proofs, declarations, and certificates are produced, the loss shall not be deemed payable."

The question whether it would be competent for a jury to find a verdict for the plaintiffs was submitted to the decision of the court upon a case stated by the parties, the material part of which was as follows :—

Part of the machinery in the plaintiffs' building was fixed and part movable. At the date of the policy, the building, land, and fixed machinery were under a mortgage, upon which a conditional judgment had been obtained and possession taken for the purpose of foreclosure, and which was afterwards assigned to D. E. Wadleigh, H. M. Fosdick, and Samuel Rice, who had meanwhile brought an execution against the plaintiffs and levied it on the equity of redemption, and afterwards made an agreement in writing to convey all their interests to Todds & Hobson, who, under that agreement, entered into the occupation of the premises, and carried on the manufacture of sugar there on their own account at the time of the fire, which took place on the 28th of August 1856.

Lorenzo Burge was the sole agent to solicit insurance for the defendants in Boston and the adjoining cities and towns, received applications, and transmitted them to the defendants at Worcester, who thereupon, if their directors approved, issued policies. Burge was paid by a commission on all moneys received by him for the defendants on applications through him upon which policies were so issued or renewed, and received proofs of losses on such policies; but never settled losses, except by express instructions from the company as to the amount for which to settle; and had no express authority to alter, change, or waive the terms and conditions of any policy.

On the 2d of September, Fosdick, the plaintiffs' clerk, delivered to Burge a written statement, signed by himself, but not under oath, of the amount and value of sugar in process of refining, and of the machinery on the premises, at the time of the fire. On the 6th of September, Burge, after a conversation with the defendants' president, wrote a letter to Fosdick, saying, " The pres-

ident of the company has directed me to inform you that he will require a full compliance with article 10 of the conditions of insurance annexed to your policy. The statement of loss must specify every item separately, and be sworn to by each of the owners." Fosdick would testify that on receiving this letter he called on Burge, who went over with him the requirements of the tenth condition of insurance, and pointed out, as the only things requiring further statement, those which he thereupon mentioned in a letter of the same day to the defendants' president, namely, the insurance in other offices, the supposed origin of the fire, and that all the owners should sign (which last he wrote could not be done, because some of the plaintiffs' stock was held abroad); and this letter, sworn to by Fosdick as the plaintiffs' clerk, together with a magistrate's certificate as required by said condition, was sent to the defendants on the 8th of September. The defendants' president wrote to Fosdick on the 18th of September, that the papers sent by him relating to this loss were not satisfactory to the defendants, nor such as were required by the terms of the policy, and that, were they executed by the proper person, they were not as full as required by the policy; and again on the 27th of September, returning the papers "for correction and amendment, not deeming them a sufficient compliance with the conditions of the policy;" reciting the tenth condition, informing him that if the property was owned by a corporation the necessary proofs should be signed and sworn to by their directors, and that the papers received were deficient in not stating the sums insured on machinery and stock separately, nor the interest of the claimants in the property insured, nor how or by whom the building was occupied at the time of the fire, and that the statement of September 2d was not under oath; and asking for an inventory of the machinery and the value of each machine. On the 29th of September Fosdick sent to the defendants a statement signed and sworn to by Wadleigh, Rice, and Fosdick, as "constituting the board of directors" of the plaintiffs' company, beginning thus: "Your favor dated 27 inst. is before me; I beg to lay before you such further details as you ask for. 1st. 'Our interest?' We are directors, and own largely of the stock of the Shawmut Sugar Refinery. 2d. 'Value thereof?' Machinery, sugar, and buildings, \$22,565;" and also stating the manner of occupation; the supposed origin of the fire; the amount of other insurance on

Proofs of Loss. — Statement of Interest.

machinery and stock separately ; and an inventory of the machinery and its value. On the 11th of October the defendants' president, in reply, wrote that the plaintiffs' directors had not yet stated, in their official capacity and under oath, the quantity and value of sugars in process of refining at the time of the fire, nor the interest which the plaintiffs had at that time in the machinery or the sugar, nor furnished the requisite certificate of a magistrate.

METCALF, J. The court have not found it necessary to decide any question discussed in this case, except that which arises on the tenth condition of insurance, printed and annexed to the policy. The loss, by the terms of the policy, was "to be paid within sixty days after notice and proof thereof made by the assured in conformity to the conditions annexed to this policy." The tenth condition required the assured to give notice in writing of the loss, "and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation," in which they should declare, among other things, what was their interest in the subject insured. The first statement of the plaintiffs' clerk was not verified by any oath, and none of their proofs of loss stated what was the interest of the plaintiffs. Burge was not an officer of the defendants, but a mere agent, with limited powers, and had therefore no authority to accept any imperfect proofs as complying with the conditions of the policy, as their president might have done. *Kibbe v. Hamilton Mutual Ins. Co.* 11 Gray, 163 ;¹ *Blake v. Exchange Mutual Ins. Co.* 12 Gray, 271, 272.² The defendants' president, far from assuming to waive any of the conditions of the policy, or to accept defective proofs of loss as sufficient, took extraordinary pains to give the plaintiffs notice of the defects and ample opportunity to cure them. Immediately upon receiving the first statement of the plaintiffs' clerk, he notified to him, through Burge, that the defendants would require a full compliance with the tenth condition of insurance. Upon receiving additional papers, he informed him that they were not full enough ; and a few days later returned the papers for correction, calling his attention especially to the want of any statement of the plaintiffs' interest in the property insured. The state of the title, as disclosed by the facts agreed, affords peculiar grounds for requiring information on this point. The plaintiffs' clerk and directors,

¹ *Ante*, p. 295.*Ante*, p. 306.

To whom Money payable.

without then setting up any waiver by Burge, sent a further statement, equally defective in this respect, merely giving, instead of the interest of the corporation in the property, the interest of the directors in the corporation. The defendants' president replied, once more calling attention to this omission. But the plaintiffs made no further attempt to correct it. This failure to comply with the conditions of insurance is fatal to the maintenance of an action on the policy. *Wellcome v. People's Equitable Mutual Fire Ins. Co.* 2 Gray, 480; ¹ *Columbian Ins. Co. v. Lawrence*, 2 Pet. 53.²
Judgment for the defendants.

SHAWMUT SUGAR REFINING COMPANY vs. HAMPDEN MUTUAL INSURANCE CO.³

(Supreme Court, Massachusetts, March, 1859.)

To whom Money payable.

A policy of insurance to "K. and others" on stock in process of manufacture, may be shown by parol evidence to have been issued to a corporation in which K. was a stockholder, having no other title in the property; and upon proof of that fact an action may be maintained thereon by the corporation in their own name; and evidence that before the policy was issued K. owned the property and had made an agreement to sell it to them, under which they had entered into possession, and carried on alone the business of manufacturing, and the application for insurance was made by one of their directors, who procured the insertion of a provision therein making it payable to the corporation in case of loss, tends to prove that fact.

ACTION OF CONTRACT upon a policy of insurance to "P. E. Kingman and others of Boston, on their sugars in process of refinery and machinery, \$1,500, sugar in storehouse, \$1,000, in wood buildings in Dedham, Mass., payable in case of loss to the Shawmut Sugar Refining Company." By indorsement, consented to by the defendants, Kingman assigned his interest in the policy to the plaintiffs. Trial in the superior court of Suffolk at November term, 1857, before Huntington, J., when a verdict was taken for the plaintiffs for the amount of the premium only, and they alleged exceptions, upon the grounds stated in the opinion.

MERRICK, J. The policy declared on in this case was issued by the defendants to "P. E. Kingman and others of Boston," on their application. After the plaintiffs had introduced upon the trial all their evidence, it was objected that it was insufficient to maintain the action, and a nonsuit moved for. This was re-

¹ *Ante*, vol. 3, p. 748.

² *Ante*, vol. 1, 264.

³ 12 Gray, 540.

To whom Money payable.

sisted by the plaintiffs, who contended, among other claims preferred by them, that upon the evidence produced and the facts proved by it, the jury could properly find that they were the parties insured; and that "P. E. Kingman and others," as used in the policy, was a description of, and meant the said Kingman and the Shawmut Sugar Refining Company.

This claim was thus formally made, and distinctly brought to the attention of the court. But the question whether the plaintiffs were in fact a party to the contract, though material to the issue and of vital importance to them, was not submitted to the determination of the jury. On the contrary, under various rulings, to which it is not necessary particularly to advert, a formal verdict by direction of the court was taken for the plaintiffs for the amount of the premium only. If therefore the plaintiffs had a right to show that, though not named or mentioned in the policy by their corporate name, they were described in it by a name which was applicable to and intended for them, that they were in truth one of the parties to the contract, and that their property was insured by it against the hazard of loss by fire, according to its terms and provisions; and if the evidence adduced upon the trial was such that in the opinion of the court the jury would have been authorized to deduce those alleged facts as inferences from it; the exceptions taken by the plaintiffs should be sustained and a new trial granted. For these facts, if established, must have had a material influence upon the decision of the issue to be determined; and might perhaps have been considered of sufficient weight and importance to have induced, in connection with the other evidence, an actual verdict against the defendants.

Upon examination of the policy it becomes at once apparent that while its object and purposes are distinctly developed, and all the stipulations contained in it are expressed in clear and intelligible terms, it is necessary to resort to some external proof to ascertain who are the contracting parties. Words are used in this contract which may be applied with equal propriety to many different persons. It is an ambiguity which needs explanation, and which the law allows to be explained. For the purpose of determining who takes, or is entitled to take, an interest in any written instrument, every material fact that will enable the court to identify the person mentioned in it is admissible in evidence. *Shore v. Wilson*, 9 Cl. & Fin. 556. The words "P. E. King-

To whom Money payable.

man and others" in the policy, as descriptive of the persons or party insured, are obviously indefinite and uncertain. But this is no reason why the real party in interest, whoever he may be, should lose or be deprived of his rights under the contract; and the law accordingly allows him to remove this uncertainty by any legal and competent proof. This differs very little, if at all, from the frequent and familiar inquiry, never denied if there be any occasion for prosecuting it, to ascertain who are the individuals associated together as partners, doing business under, and bound by contracts executed in, the name of their firm. The rule or principle upon which this is allowed was stated and illustrated by Rolfe, B., in a few simple but expressive words. "Speaking philosophically," he said, "you must always look beyond the instrument itself, to some extent, to ascertain who is meant." "There may indeed be no difficulty in ascertaining who is meant when a person who has five or six names, and some of them unusual ones, is described in full; while, on the other hand, a devise simply to John Smith, would necessarily create some confusion." *Clayton v. Lord Nugent*, 13 M. & W. 207. In our own court, it was many years since determined, upon a demurrer to a declaration in which the fact was alleged, and it was said that the same thing might equally as well have been established by proofs as by the statements in the record, that a promissory note payable in terms to Richardson, Metcalf & Co., was in truth a contract made with, and a note payable to, the Medway Cotton Manufactory; and that an action for the recovery of its contents could be maintained in the name of that corporation. *Medway Cotton Manufactory v. Adams*, 10 Mass. 360. See also *Nute v. Hamilton Ins. Co.* 6 Gray, 174.¹

It was the right, therefore, of the plaintiffs to prove, if they could, that they were one of the contracting parties, and had a beneficial interest in the contract. Whether the evidence which they produced upon the trial was sufficient to constitute that proof is a different question. But that it had such a tendency can with no propriety be disputed. On looking into the policy, one of the first and most material things disclosed in it is, that the parties contemplated the conduct and prosecution of a particular branch of manufacturing, during the continuance of which there would be continual changes of the property insured; that

¹ *Ante*, p. 63.

To whom Money payable.

the policy was intended to cover not only that which the insured owned at the time when the contract was entered into, but also that, of the kind described, which they should own and have in their business at any period while it was to remain in force. Then by the extrinsic evidence it was shown that Kingman, who had before carried on the business, and owned the whole of the real estate and machinery, contracted with the plaintiffs to sell and convey the entire establishment to them; that, although it was left in some uncertainty at what particular time the conveyance was actually made, they entered upon and took possession of the real estate before any insurance was applied for, and thenceforward carried on the business of refining sugar there on their own account, as sole owners and proprietors; and that the application to the defendants for insurance was made by Rice, one of the directors of the plaintiff corporation, who caused to be inserted in the policy a stipulation that in case of loss all the money to be paid by way of indemnity should be payable and paid directly to them. They were thus in effect the chief party in interest, and expected to have in the future much the largest share of property at hazard. These were all facts fit and proper to have been submitted to the consideration of the jury; and if their inference from these facts should have been that the plaintiffs were one of the parties to the contract, because they were included in, and intended to be described by the terms "P. E. Kingman and others," and if they should have rendered their verdict accordingly, we are not prepared, upon this question, to affirm that such a verdict would have been unsustained by, and still less that it was contrary to, or against the weight and proper effect of, the evidence.

If in addition to the fact that the plaintiffs were a party to the contract of insurance, it had also been found that a loss by fire had occurred of any portion of the insured property of which they were the owners by acquisition of the same in the due course and prosecution of their business as refiners of sugar, and that they had in all respects performed the conditions and complied with the requisitions specified in the policy, they would have been entitled to recover to the extent of their loss, not, however, exceeding their limited amount of insurance. This would not have included compensation for any injury to the real estate or fixed machinery; but recovery might have been had for the

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loss of such movable and portable machinery, if any, as, according to the suggestion of their counsel at the argument, they necessarily procured from time to time, in place of such as was used up and worn out in the ordinary course of carrying on and managing their business. None of the property, however, whether real or personal, which belonged to Kingman at the time of the issuing of the policy, and which was afterwards transferred by him to the plaintiffs, could be considered as insured in their hands under the policy, because, so far as he was concerned, that was under its special provisions and conditions made null and void by the act of alienation. *Exceptions sustained.*

BAXENDALE & others vs. HARVEY.¹

(Exchequer, England, Easter Term, 1859.)

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The plaintiffs had effected with the Norwich Union Fire Insurance Society a policy of insurance, which contained (amongst others) the following condition: "Every policy issued by this society will be void, unless the nature and material structure of the buildings and property insured, and of all buildings which contain any part of the property insured, be fully and accurately described in such policy, and unless the trades carried on in all such buildings be correctly shown; and unless it is stated in such policy whether any hazardous goods are deposited in any such buildings; and whether there be any stove or apparatus for producing heat (other than common fireplaces in private houses), used or employed in such buildings, or in any building, yard, or other place adjoining or near to the property insured, and belonging to or occupied by the party insured; and if there be any building of a hazardous nature or structure, or in which hazardous trades are carried on, or hazardous goods deposited, belonging to or occupied by the party insured, adjoining or near to the property insured, the same must also be specified in the policy, or it will be void." The plaintiffs, who were carriers, in 1843, erected on the premises insured, a steam-engine which they used for hoisting goods. This steam-engine was specified in the policy. The plaintiffs, in 1844, applied the steam-engine to grinding provender for their horses. They attached to it a horizontal shaft, which was carried through the floor to an upper room, where they erected winnowing and grinding machines. The policy was renewed in 1857. The society had no knowledge of the erection of the additional machinery or that the steam-engine was used for grinding. The premises having been destroyed by fire: *Held*, that the alteration did not avoid the policy, the jury having found that there was no increase of risk.

ASSUMPSIT on a policy of insurance effected by the plaintiffs in the Norwich Union Fire Insurance Society. The declaration set out the policy, which stated that the plaintiffs, carriers, insured "£80,000. on the live and dead stock and utensils in trade, and goods in transit in the plaintiffs' warehouses, old and new offices, and stables, all adjoining and communicating, situate by the side of the canal at the Camden Town Station of the North

¹ 4 H. & N. 445.

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Western Railway, brick and slate, having therein a cooking apparatus, three stoves securely fixed, and a steam-engine of twelve horse power, the boiler of which was declared to be in a brick arched vault." The declaration set out the terms and conditions indorsed on the policy, which were (amongst others) as follows : —

"3rd. Every policy issued by this society will be void, unless the nature and material structure of the buildings and property insured, and of all buildings which contain any part of the property insured, be fully and accurately described in such policy ; and unless the trades carried on in all such buildings be correctly shown ; and unless it be stated in such policy whether any hazardous goods be deposited in any such buildings ; and whether there be any stove or apparatus for producing heat (other than common fireplaces in private houses) used or employed in any such buildings, or in any building, yard, or other place adjoining or near to the property insured, and belonging to or occupied by the party insured ; and if there be any building of a hazardous nature or structure, or in which hazardous trades are carried on, or hazardous goods deposited, belonging to or occupied by the party insured, adjoining or near to the property insured, the same must also be specified in the policy, or it will be void."

"4th. If any alteration or addition be made in or to any building insured, or in which any insured property is contained, or in or to any building adjoining, or near to the property insured, belonging to or occupied by the party insured, by which the risk of fire, to which the building or property insured, or the building containing such property, is or may be exposed, be increased ; or if such risk be increased either by any of the means adverted to in the third condition, or in any other manner ; or if any property insured be removed into other places, such alteration or addition, increase of risk or removal, must be immediately notified to the society in order to its being allowed by indorsement on the policy, such indorsement being signed by one of the society's secretaries or agents, otherwise the policy will be void."

The declaration contained the usual averments, that the plaintiffs were interested in the property insured, and had paid the annual premium ; and it alleged that the said stock, utensils in trade, and goods in transit in the policy mentioned, were destroyed by fire ; and that all things had been done and happened,

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&c., to entitle the plaintiffs to be paid the amount of their loss.

Breach : Non-payment.

Pleas (*inter alia*). Sixth. That the nature and material structure of the buildings and property insured, and of the buildings which contained the property insured by the said policy, were not nor are fully and accurately described in the said policy as required by the third condition indorsed on the policy, in this, that manufactories, processes, and trades, attended with peculiar danger, were carried on in and upon the said buildings and property insured, and in and upon the said buildings containing the property insured, which manufactories, processes, and trades were not, nor was any of them, mentioned or described or noticed in the said policy ; and the defendant says that he did not accept or assent to the description, statement, and specification contained in the said policy as a complete and sufficient compliance with the said third condition thereon indorsed : whereby the said policy was and is void.

Seventh. That the said property insured, and the buildings containing such property, and the risk to be insured against, were not duly described in the said policy ; but the same were described in the said policy otherwise than they really were, and so as to cause the said insurance to be effected, and the same was effected, at a lower premium than it otherwise would and ought to have been. And the defendant says that he did not accept or assent to the description, statement, and specification contained in the said policy as a complete and sufficient compliance with the said third condition indorsed on the said policy, or as a true, correct, or adequate description of the said property insured, and the buildings containing the same, and of the risk to be insured against : whereby the said policy was and is void.

Replications taking issue on the pleas.

At the trial, before Pollock, C. B., at the London sittings after last Hilary term, it appeared that the plaintiffs, who were carriers, had for many years effected insurance with the Norwich Union Fire Insurance Society, of which the defendant was a director. In the year 1843, the plaintiffs erected, in a vault on the premises insured, a steam-engine of twelve horse power, which they used solely for working cranes in hoisting in goods to their carriers' warehouse. The insurance society had notice of this steam-engine, and the purpose for which it was used ; and in

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consequence they increased the premium from 2s. 6d. to 4s. 6d. per cent. In the year 1844, the plaintiffs used the steam-engine for grinding provender for their horses. They attached to it a horizontal shaft, which was carried through the floor to an upper room where they erected winnowing machines, and machines for crushing oats, splitting beans, &c. The society had no knowledge of the additional machinery, or that the steam-engine was used for any other purposes than that of hoisting, until after the fire took place. The policy on which this action was brought was effected in July, 1857, and it appeared that there were different classes of insurance at different rates of premium.

It was submitted, on the part of the defendant, that there was a misdescription of the risk at the time the policy was granted. The learned judge left the following questions to the jury: First, had the insurance society notice that the steam-engine was put up for purposes more general than hoisting? Secondly, was the use of the steam-engine unreasonable, or such as the society might have expected from its being put up for other purposes? Thirdly, was the steam-engine used for other purposes than for the plaintiffs' establishment? Fourthly, had the society notice of the particular use to which the steam-engine had been applied? Fifthly, did the particular use to which the steam-engine was applied increase the risk beyond what might be expected from its being used for general purposes? Lastly, was the risk correctly described in the policy? The jury found the first and last questions in the affirmative, and all the others in the negative; whereupon his lordship directed a verdict for the plaintiffs, reserving leave to the defendants to move to enter the verdict for them.

Lush now moved to enter the verdict for the defendants, or for a new trial, on the ground of misdirection, and that the verdict was against the evidence. There was either a misdescription of the steam-engine or a misdescription of the building insured, and therefore the policy is void by the third and fourth conditions. When the steam-engine was first erected it was used solely for the purpose of hoisting; but its application to the purposes of grinding, together with the erection of additional machinery, increased the risk. [POLLOCK, C. B. This is a mere increase of danger. It is like the case of a person who has an oven on his premises, and instead of using it for baking bread he

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uses it for some other purpose. If a person who insures his life goes up in a balloon, that does not vitiate his policy.] Here there is an increase in the nature of the risk, not in degree only.

MARTIN, B. I am of opinion that there ought to be no rule. The plaintiffs erected on the premises insured a steam-engine which they then used for hoisting only. They afterwards applied it to the purpose of providing food for their horses; so that it was used for something essential to their business as carriers. The question is whether such a use of the steam-engine vitiates the policy. By the third condition, "Every policy issued by this society will be void, unless the nature and material structure of the buildings and property insured be fully and accurately described in such policy." In my opinion the machinery attached to this steam-engine was not a part of the nature and material structure of the building and property insured. The condition also says, "and of all buildings which contain any part of the property insured." This is not the case of a building; it is an operation carried on in a building, by which the plaintiffs provide food for their horses. The condition also says, "and if there be any building of a hazardous nature or structure, or in which hazardous trades are carried on, or hazardous goods deposited, the same must also be specified in the policy." It was a question for the jury whether the operation which the plaintiffs carried on, and which was necessary for their trade as carriers, so increased the risk as to be of a hazardous nature, and they have found it did not. Therefore, the case not being within the third condition, it was not necessary under the fourth condition for the plaintiffs to give notice that they had applied the steam-engine to the purposes of grinding. *Stokes v. Cox*, 1 H. & N. 533,¹ is an authority that, if the insurers wish to make it a condition precedent to the validity of the policy that there shall be no alteration in the circumstances, whether the risk is increased or not, they must do so in distinct terms.

BRAMWELL, B. I am of the same opinion. It is argued that the policy is subject to certain conditions which the plaintiffs have not complied with. The third condition requires the nature and material structure of the buildings and property insured to be fully and accurately described in the policy. Then the question is, whether there has been any want of a full and accurate

¹ *Ante*, p. 77.

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description of them. The buildings had in them a steam-engine which was described in the policy. This steam-engine was formerly used for hoisting, but afterwards some machinery was added to it and it was used for grinding food for horses. Then, does that circumstance render the description, which would otherwise be accurate, one that is not so. In my opinion it does not. The "nature and material structure of the buildings," whether they are built of stone, brick, or wood; or whether they are tiled, slated, or thatched. The term manifestly refers to what may be called the essence of the building and not to its incidents. There is no condition making it obligatory on the insured to describe every alteration in the machinery in the buildings.

CHANNELL, B. I am also of opinion that there ought to be no rule. It is said that there are conditions in the policy which, not being complied with, render it void. The question is whether, under the third condition, this machinery is a part of "the nature and material structure of the buildings insured." In my opinion it is not. What is meant is, whatever be the nature and structure of the buildings, whether built of stone, brick, or wood, or covered with slate or tiles, they must be accurately described. I do not think that this machinery can be considered as part of the nature or structure of the buildings. That being the construction of the third condition, the fourth does not carry the argument any further.

POLLOCK, C. B. I agree that there ought to be no rule. In cases of insurance the courts ought to give every facility to the detection of fraud; but where the transaction is *bond fide*, it is the duty of the insurers to establish their objection free from doubt. In this case the society had notice that the steam-engine was on the premises, and that it was employed for a particular purpose; but their objection is, that it was afterwards employed for another purpose, which they did not know of or anticipate, and which increased the danger. The answer is that the society allowed the erection of the steam-engine without any qualification whatever as to its purpose; and if they meant it to be confined to the one use, they should have stipulated that it should be used for the purpose of hoisting only. The jury found that there was no increase of risk by using the steam-engine for grinding, and the society having had notice of the nature of the risk, were not entitled to any notice by reason of the increase of

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danger. A person who insures may light as many candles as he please in his house, though each additional candle increases the danger of setting the house on fire. *Rule refused.*

BROWN & others vs. ROYAL INSURANCE CO. (registered).¹

(Queen's Bench, England, Easter Term, 1859.)

Reinstating Premises.

Defendants executed a policy insuring plaintiff's premises against fire; reserving to themselves "the right of reinstatement in preference to the payment of claims." The premises were damaged by fire, and defendants elected to reinstate them, but did not do so. To an action for not paying, compensating, or reinstating, defendants pleaded that they elected to reinstate, and were proceeding to do so when the commissioners of sewers, under the Metropolitan Building Act, 1855, caused the premises to be taken down, as being a structure in a dangerous condition; and that such dangerous condition was not caused by the damage from the fire. On demurrer, held by Lord Campbell, C. J., Crompton, J., and Hill, J., dissentiente Erle, J., that the plea was bad, inasmuch as the contract to reinstate (which became the one contract under the policy, after election made) being lawful, at and ever since the time of contracting, the impossibility of its performance was no defence, and the defendants were bound, if they could not perform it, to pay damages for not doing so.

THE first count of the declaration set out a policy of insurance effected by the plaintiff with the defendants, insuring from fire, for one year, to the amount of £1,500, certain premises in the occupation of the plaintiff Brown, subject to certain conditions indorsed on the policy, and set out in the declaration. The 12th condition (the only one material to the present case) was as follows: "Persons insured by this company, and who may suffer loss, will receive their indemnity without deduction or discount; but, in every case of loss, the company will reserve to itself the right of reinstatement in preference to the payment of claims, if it shall judge the former course to be most expedient." Averment, "That after the making of the said policy, and before this suit, the said insured premises were partly burnt down and consumed and destroyed by fire, and the residue of the said insured premises were damaged by fire, and thereby rendered unsafe and dangerous, and by reason thereof the same were obliged to be, and were, pulled down; by which said burning down, consuming, and destruction by such fire as aforesaid, and damaging and pulling down of the said insured premises, the plaintiffs sustained damage and loss to a large amount, to wit, to the full amount of £1,500, so insured on the said prem-

¹ 1 E. & E. 853.

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ises by the said policy as aforesaid. And the plaintiffs further say that, before and at the commencement of this suit, all conditions precedent had been performed, and all things existed necessary, and all times had elapsed necessary, to entitle the plaintiffs to be paid by the said company the said amount of their said damage and loss, or to have the said premises reinstated by the said company. Yet the said company have not paid the said amount of the said damage and loss of the plaintiffs, nor has the said company reinstated the said premises, and such damage and loss has not, nor has any part thereof, been made good to the plaintiffs." The second count, after stating the execution of the policy, "as in the first count mentioned, with the same conditions as therein mentioned," and the damage by fire to the premises, as stated in the first count, proceeded as follows: "And the plaintiffs say that the said company thereupon, having notice of the premises, elected to reinstate the said insured premises under the said policy in preference to the payment of the plaintiffs' claim for the loss and damage aforesaid, and gave notice of such election to the plaintiffs; and the said company thereupon began and proceeded to reinstate and restore the said insured premises; yet the said company did not complete or finish the reinstatement of the said premises, or proceed with due care, skill, dispatch, or diligence in such reinstatement, although a reasonable time for such purposes long since elapsed, but therein failed and made default; and by reason thereof the remains of said premises, not so destroyed by fire as aforesaid, afterwards settled, sank, cracked, and gave way, and became dangerous and ruinous, and were thereby afterwards obliged to be, and were, taken and pulled down, and have never been reinstated by the defendants; and thereby also the plaintiff, James Brown, was put to great expense in and about certain proceedings taken by the commissioners of sewers of London, for the pulling down of the said premises, and was for a long time deprived of the use of the said premises, of which he was the tenant at the time of the said fire and damage, and was hindered from carrying on his trade," &c.

Second plea. "As to so much of the first count as alleges that the said insured premises were partly burned down and consumed and destroyed by fire, and the residue of the said premises were damaged by fire, whereby the plaintiffs sustained loss and

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damage, the defendants say that, within a reasonable time after the happening of the loss and damage in the introductory part of this plea mentioned, the defendants, in pursuance of the said condition, on the said policy indorsed, judged it expedient and elected to reinstate the said insured premises in preference to the payment of the plaintiffs' claim for the said loss and damage, of which the plaintiffs then had notice. And the defendants further say that, within a reasonable time after the happening of the said loss and damage, they proceeded to reinstate the said insured premises as aforesaid, and did proceed, and were proceeding, with all reasonable dispatch, in the reinstatement of the same as aforesaid, until the commissioners of sewers in the city of London, duly acting under the authority and in pursuance of the provisions of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down as a structure in a dangerous condition, whereby the defendants were prevented from further proceeding with or completing the reinstatement of the said insured premises as aforesaid. And the defendants further say that the dangerous condition of the said insured premises at the time of their being so caused to be taken down, and for which they were so caused to be taken down as aforesaid, was not caused by the burning down, consuming, destruction, or damaging by fire, of the said insured premises in the said first count mentioned respectively; and that, if the said commissioners had not caused the said premises to be taken down as aforesaid, the defendants might, could, and would have reinstated the said premises in, and restored them to, the same state and condition as they were in before and at the time of the happening of the said loss and damage by fire."

Third plea, as to the second count. "That, after the happening of the loss and damage by fire, in that count mentioned," the defendants "did proceed, and were proceeding, with due care, skill, dispatch, and diligence in the said reinstatement of the said insured premises, until the commissioners of sewers of the city of London, duly acting under the authority and in pursuance of the provisions of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down as a structure in a dangerous condition, and which is the taking and pulling down in the second

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count mentioned ; whereby the defendants were prevented from further proceeding with, or completing or finishing the reinstatement of the said insured premises." The plea then proceeded in the same form as the second plea.

Demurrer to both pleas. Joinder in demurrer.

LORD CAMPBELL, C. J. I am of opinion that our judgment ought to be for the plaintiffs. The case stands as if the policy had been simply to reinstate the premises in case of fire ; because, where a contract provides for an election, the party making the election is in the same position as if he had originally contracted to do the act which he has elected to do. The premises, then, having suffered this damage by fire, and the defendants not having reinstated them, do these pleas furnish a defence to an action for not reinstating ? I am of opinion that they do not. The defendants undertook to do what was lawful at the time, and has continued to be lawful ; that being so, the fact that performance has become impossible is no legal excuse for their not performing it, and they are liable in damages. That is the doctrine to be deduced from a class of cases to which I referred in my judgment in *Hall v. Wright*, E., B. & E. 746, 758. If any one undertakes to do a particular lawful act, and does not do it, it is no excuse that he cannot do it, if the law has not since rendered it unlawful. There was nothing unlawful in this contract ; and if it is impossible for the defendants to perform it, they must pay for that impossibility.

ERLE, J. I cannot concur in the judgment which has just been given. If it be correct, it seems to me to follow as a consequence, that the plaintiffs could claim damages unless the defendants entirely rebuilt the premises. The contract must (the election having been made) be considered as a contract to reinstate the premises in their original condition. The defendants were willing to do so ; but before they could do so, the commissioners prohibited them ; so that the performance of the contract became impossible. The defence raised by the pleas seems to be either that, or else, that the non-performance of the contract by the defendants arose from the fault of the plaintiffs themselves in allowing their premises to get into such a dangerous state that the commissioners ordered them to be pulled down. I think the defence is good either way. If not, the plaintiffs would have a right to an entire new house, which was not stipulated for by the contract.

 Notice of Loss. — Arbitration.

CROMPTON, J. We have nothing to do with the mode in which the damages are to be assessed. I think the pleas are no answer to the action. There was not, and is not anything illegal in what the defendants must now be considered as having contracted to do; and therefore the maxim given in Co. Litt. 146 *a*, applies, "Quod semel placuit in electionibus amplius displicere non potest." The defendants are bound by their election; and if the performance has become impossible, or (which is all they have shown) more expensive than they had anticipated, still they must either perform their contract or pay damages for not performing it.

HILL, J. I also am of opinion that the pleas are no answer. If we held that they were, the consequence would be that the defendants, although they themselves admit that they are bound to do something, would not be liable to do anything under their contract. The maxim given in Co. Litt. 146 *a*, and cited by my brother Crompton, applies here. I do not see that the performance of the contract has become impossible; it has become more expensive, no doubt; but that is no answer.

Judgment for the plaintiffs.

 ROPER vs. LENDON.¹

(Queen's Bench, England, Easter Term, 1859.)

Notice of Loss. — Arbitration.

Declaration against defendant, secretary of an insurance company, on a policy of insurance against fire, effected by plaintiff with the company. The declaration set out in the policy, which was declared to be granted subject to certain conditions indorsed thereon; the fifteenth condition being as follows: "All persons insured by this company, sustaining any loss or damage by fire, shall forthwith give notice thereof to the directors or secretary of this company, at their office in M.; and, within fifteen days after such fire, deliver in as particular an account of their loss or damage as the nature of the case will admit of." "In case any difference or dispute shall arise between the insured and the company, touching any loss or damage, or otherwise in respect of any insurance, such difference shall be submitted to the judgment and determination of two indifferent persons as arbitrators, of whom one shall be chosen by this company, and the other by the insured; and such two arbitrators shall, previously to entering upon the reference, agree upon and nominate a third person to be an arbitrator with them; and the award in writing of any two of the three arbitrators so chosen shall be conclusive and binding on all parties; and if any fraud or false swearing shall appear on the part of the insured, and the same shall be certified in writing by any two of the said arbitrators, the party insured shall forfeit all claim under the policy." The declaration then averred a loss by fire, during the continuance of the policy, to the full amount insured; that plaintiff had done all things, and all things had happened, and all times had elapsed, to entitle him to have such loss made good by the company; of which the company had notice, but did not

¹ 1 E. & E. 825.

Notice of Loss. — Arbitration.

make good the loss. Plea 2. That plaintiff did not forthwith give notice of, or within fifteen days after the fire deliver an account of his supposed loss or damage by fire, as required by the policy and condition in that behalf. Plea 6. That this action is brought for and in respect of a difference and dispute between the insured and the company, touching the said loss and damage, within the meaning of the fifteenth of the conditions indorsed on the policy; and that the company have never declined, but have always been ready to refer such difference and dispute to the judgment and determination of two indifferent persons as arbitrators, in manner provided for by the said condition, of which plaintiff had notice before suit; and the said dispute or difference, and the amount of plaintiff's supposed loss or damage, have never been determined, as by the same condition is provided. *Held*, on demurrer to these pleas, that the second plea was good, but the sixth plea bad.

DECLARATION against the defendant, as secretary of the Kent Fire Insurance Company, on a policy of insurance against fire, effected by the plaintiff with the said company on the household furniture and effects, stock in trade, fixtures, and fittings in his dwelling-house. The declaration set out the policy, which was granted subject to certain conditions thereon indorsed, also set out, of which the following only are material: —

Condition 10. The amount of every loss will be paid, without any discount or deduction, immediately after the same shall have been established to the satisfaction of the directors; but they reserve to themselves in all cases the option of reinstating within a reasonable time.

Condition 15. All persons insured by this company, sustaining any loss or damage by fire, shall forthwith give notice thereof to the directors or secretary of this company, at their office in Maidstone, and, within fifteen days after such fire, deliver in as particular an account of their loss or damage as the nature of the case will admit of, and shall also make proof of the amount of such loss or damage, by his, her, or their solemn declaration or affirmation, by their books or accounts, and by such other proper vouchers as shall be reasonably required. In case any difference or dispute shall arise between the insured and the company touching any loss or damage, or otherwise in respect of any insurance, such difference shall be submitted to the judgment and determination of two indifferent persons as arbitrators, of whom one shall be chosen by this company, and the other by the insured, and such two arbitrators shall, previously to entering upon the reference, agree upon and nominate a third person to be an arbitrator with them; and the award in writing of any two of the three arbitrators so chosen shall be conclusive and binding on all parties; and if any fraud or false swearing shall appear on the

Notice of Loss. — Arbitration.

part of the insured, and the same shall be certified in writing by any two of the said arbitrators, the party insured shall forfeit all claims under the policy.

The declaration then averred that while the policy was in full force the plaintiff sustained loss and damage by fire, on the property described in the policy, to the amount of the sums therein specified as the value thereof; that the plaintiff had done all things necessary to be done, and that all things had been done and had happened which were necessary to be done and to happen in order to entitle the plaintiff to have such loss and damage paid and made good to him by the company, and that the time for paying and making the same good elapsed before suit, of all which the company had notice; but the company did not pay or make good the loss.

Demurrer to the declaration. Joinder in demurrer.

The defendant also pleaded six pleas, the second and sixth of which were as follows:—

Plea 2: That the plaintiff did not forthwith give notice of, or, within fifteen days after the said fire, deliver an account of his supposed loss or damage by fire, as required by the said policy and condition in that behalf.

Plea 6: That this action is brought for and in respect of a difference and dispute between the said insured and the said company, touching the said loss and damage, within the meaning of the fifteenth of the conditions indorsed on the said policy; and that the said company have never declined, but have always been ready and willing, to refer such difference and dispute to the judgment and determination of two indifferent persons as arbitrators, in manner provided by the said condition, of all which the plaintiff, before suit, had due notice; and the said dispute or difference and the amount of the plaintiff's supposed loss or damage have never been determined, as by the same condition is provided.

Demurrer to the second and sixth pleas respectively. Joinder in demurrer.

Lord CAMPBELL, C. J. The second plea is clearly good. The whole of the fifteenth condition, relating to the delivery of particulars of loss, must be taken together, *tale quale*. When, therefore, it is conceded that a delivery of such particulars, before action, is essential, it follows, from the wording of the condition,

Overvaluation. — Fraud.

that the delivery must be within fifteen days after the loss. And the condition so construed is a very reasonable one ; it being obviously of great importance to the defendant's company to know, as soon as possible after a loss, the amount claimed by the assured. The sixth plea is as clearly bad. The agreement to refer, contained in the fifteenth condition, is merely collateral to the agreement to pay. The courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference. The distinction between the present case and cases like *Scott v. Avery* is plainly pointed out in the judgment there delivered in the house of lords. The present case does not fall within that decision, and the defendant could have enforced the agreement to refer only by an application under the Common Law Procedure Act, 1854, sect. 11.

(ERLE, J., and CROMPTON, J., were absent.)

HILL, J. I am of the same opinion. By the terms of the policy, the conditions indorsed on the back are incorporated with it. The defendant's company agree to be liable only according to the tenor of those conditions. One of these conditions requires the assured, "within fifteen days after" a fire, to "deliver in as particular an account of their loss or damage as the nature of the case will admit of." The plaintiff has not done so ; there must therefore be a judgment for the defendant on the second plea. The sixth plea, however, is bad. The case is clearly not within the decision in *Scott v. Avery*. Here, the agreement to refer is collateral to the agreement by the company to pay ; there, the agreement was to pay only such a sum as the arbitrators should award. On this plea, therefore, there must be judgment for the plaintiff.

Judgment for the plaintiff on the demurrers to the declaration and to the sixth plea ; and for the defendant on the demurrer to the second plea.

DICKSON vs. EQUITABLE FIRE ASSURANCE CO.¹ (Queen's Bench, Upper Canada, Easter Term, 1859.) Overvaluation. — Fraud.

The plaintiff effected an insurance with defendants on certain buildings, for \$1,100, stating their value to be £750. In an action on this policy, it appeared that a few days before he had insured the same houses, together with a driving-shed, worth \$400, in another

¹ 18 Up. Can. Q. B. 246.

Action. — Assignee. — Renewal. — Other Insurance.

office for \$900, and had then valued the whole at from \$1,200 to \$1,400. The evidence as to the actual value was contradictory, and the great difference in the plaintiff's two valuations was not explained. The jury having found for the plaintiff: *Held*, that the evidence supported a plea of fraudulent overvaluation, and a new trial was granted, with costs to abide the event.

Where the insurers have neglected to inspect the buildings for themselves, but have trusted to the statements of the owner, the court will not interfere, unless the evidence is very strong to show fraud.

DEMILL vs. HARTFORD INSURANCE CO.¹ (Supreme Court, New Brunswick, Easter Term, 1839.) *Action. — Assignee. — Renewal. — Other Insurance.*

The assignee of a policy of insurance and of the property insured does not, by such assignment, acquire any right of action against the insurer on the original contract, though the assignment is made with his consent, and in accordance with one of the conditions of the policy; but a new promise by the insurer, supported by a valid consideration, to give the assignee the benefit of the insurance, will support an action.

The declaration in an action by the assignee of a policy of insurance made by the defendant with A, after setting out the policy, the payment of the premium by A, and his assignment to the plaintiff with the defendant's consent according to one of the conditions of the policy, whereby the defendant was released from liability to A, stated, that in consideration that the plaintiff, at the request of the defendant, had undertaken and promised the defendant to perform all things in the policy contained on the plaintiff's part to be performed in pursuance of the consent to assign, and in consideration of the assignment of the property from A to the plaintiff, and the release thereby of all liability of the defendant to A, and of the assignment of the policy with the defendant's consent, and in consideration of the payment of the premium so received as aforesaid, the defendant promised the plaintiff to be the insurer to him, &c. *Held*, that there was not a sufficient consideration shown to support the defendant's promise.

The receipt of a renewal premium on the policy by the insurer from the assignee is a sufficient consideration for a new promise by the insurer to the assignee.

One of the conditions of a policy declared that if the insured should thereafter make any other insurance on the property, and should not with all reasonable diligence give notice thereof to the insurer, and have the same indorsed on the policy or otherwise acknowledged in writing, the policy should cease and be of no further effect; and if any subsequent insurance should be made, which, with the sum already insured, should in the opinion of the insurer amount to an overinsurance, he should have the right of cancelling the policy by paying to the insured the unexpired premium *pro rata*. In an action on a policy where there was a subsequent insurance the declaration averred that notice thereof was forthwith given to the insurer (the defendant), and it thereby became his duty to indorse such subsequent insurance on the policy or to acknowledge the same in writing, but that he neglected and refused so to do. *Held*, on demurrer, that the declaration was sufficient, and that a tender of the policy to the insurer for indorsement, or a request to him to indorse or acknowledge it in writing, was not necessary.

Quære, whether the defendant could be charged with a breach of duty in not indorsing the subsequent insurance, unless the policy was tendered to him for that purpose; but *held*, that the averment that it was the defendant's duty to indorse it might be treated as surplusage.

¹ 4 Allen, New Bruns. 341.

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 JOEL H. DIX *et al.* vs. MERCANTILE INSURANCE CO.
 SAME vs. THE CHICAGO CITY INSURANCE CO.¹

(Supreme Court, Illinois, April Term, 1859.)

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Three partners insured the property in question; and one of them sold his interest in the firm to the other two without the consent of the underwriter. The policy prohibiting (without consent) "any transfer or change of title in the property insured:" Held, that an action in the name of the three partners could not be maintained.

DEMURREE to a declaration which set out the above facts.

BREESE, J. We do not well see how this action can be maintained, and at the same time preserve an important principle which lies at the very foundation of suits at law. That principle is, that an action on a contract must be brought in the name of the party in whom the legal interest in the contract is vested. 1 Ch. Pl. 3. A party suing, who, by his own showing, by the averments in his declaration, has no interest whatever in the cause of action, never can be permitted to recover in an action at law.

We think a case cannot be found decided in a court of law, where a person having no legal interest in the subject matter of the action has been allowed to maintain an action at law alone or with the others. It is impossible that he can, since, by his own showing, he has nothing for which to sue. All the interest of one of the parties had passed out of him. 16 Peters, 501.

But it is insisted that by another rule of law equally fundamental, a suit on a contract must be brought in the names of the parties contracting, and therefore this action is properly brought, the contract of insurance having been made with the plaintiffs.

This is all very well, very true, and would be decisive, did not the declaration disclose the fact of want of interest. Had the declaration been silent on the fact of assignment, — and it might well have been, — it would be good without such allegation, there can be no question of a proper case being stated, against which the defendant by plea should defend. But the declaration itself showing the nakedness of the case, — being in fact a *felo de se*, — the defendant could do nothing but demur, for by so doing, by admitting the facts as the plaintiffs have stated them, the case for the defendants could not be better made out. Why disclose in

¹ 22 Ill. 272.

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the declaration the fact of the assignment by one of the plaintiffs to the others? What was expected by the pleader to be gained by it? Would it not have been better to let that matter of assignment, and the question growing out of it, come from defendant by plea? Could not the rights of the two partners be fully protected, in the usual mode of declaring in the name of those with whom the contract was made, but for the use of the parties really entitled? or why say anything about it in the declaration? As it is stated, the case made by the declaration destroys itself. It is *felo de se*.

The declaration showing that one of the plaintiffs had parted with his interest in the property insured, before the loss accrued, puts an end to the case on another principle well established and universally recognized, and that is, upon a policy against loss by fire, no recovery can be had unless the insured has an interest in the property insured at the time of the loss.

Now, without insisting upon the first objection, this must be fatal, and must dispose of the case. Who were the parties insured? The policy shows they were Sinclair, Dix, and Harris. Who had the interest at the time of the loss? Dix and Harris. Sinclair, then, had no ground of recovery when suit was brought, — having no interest in the property, he could not be damaged by its loss.

But independent of all this, this condition was annexed to the policy: "And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease." Here was a transfer by one of the insured to the others of his undivided interest in the property insured. There is a change of title to an undivided interest in the property. At the date of the policy it belonged to Sinclair; at the time of the loss it was the property of Dix and Harris; so that there was a complete transfer and change of title to this undivided interest.

It is, however, replied to this, that the reason on which this condition is based is to prevent parties insured from transferring the property to strangers, and thus introducing into its care and management parties not known to the insurers. Much argument, in support of this position, has been advanced, and cases cited, supposed to sustain it, which are by no means satisfactory.

A contract, as well of insurance as in regard to any other mat-

ter, must be interpreted according to the intention of the parties making it, and that to be gathered from the language and terms employed, and the objects contemplated by it.

The intention of the company was manifestly, as urged, that no strangers should come into the management and care of this property without their consent. Knowing the parties with whom they were contracting, relying upon the fidelity and circumspection of each and every one of them, they were willing to take the risk at the premium stipulated. It was an object of the first importance with them to secure for the property the guardianship and care of faithful and trustworthy men, and for this they were willing, for the premium, to intrust the property to the care of Sinclair, Dix, and Harris, but not to the care and watchfulness of Dix and Harris alone. Is it not plain that the assurers may be as greatly prejudiced by removing one, to whom, with others, they had intrusted the guardianship of valuable property, as by the introduction of a stranger? The one removing from the concern may have been the very one on whose vigilance, fidelity, and care, the greatest share of confidence was reposed; and by so removing, the hazard is increased to the assurer without any corresponding increase of premium. This is neither just nor equitable. The plaintiffs, therefore, have no right to say that it was against "the coming in of strangers" this condition was aimed. The assurers have bargained and paid for the care and watchfulness of each and every person whose property they have insured, and they have an undoubted right to hold them to a strict observance of the contract; and we have no right to say, when it is agreed between them and the assured that a transfer or change of title to the property, or to an undivided part of it, shall make the policy void, that they were stipulating against a transfer to strangers only. The terms used are too broad for that, and the object of the condition would be defeated by so restricting them, as we have endeavored to show.

There is a vast difference between the sale by one partner of his entire interest in a partnership concern, and a change simply in the relative shares in the concern; for in the latter case the watchfulness and care of the partner which was bargained for still continues, whilst in the former it is forever gone.

We have no doubt upon any of the positions we have here assumed, and consider any reference to adjudged cases on the point,

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or comments on them, wholly unnecessary. *Howard v. The Albany Insurance Co.* 3 Denio, 301,¹ and *Murdock v. The Chenango County Mutual Insurance Co.* 2 Comstock, 210,² are to the point.

1. The plaintiffs have, by their own showing, defeated their case.

2. One of the plaintiffs, by the showing of the declaration, had no insurable interest at the time of the loss.

3. The transfer and change of title by one partner to the others avoided the policy.

The judgment of the circuit court is affirmed.

Judgment affirmed.

In the case of *The Hartford Fire Insurance Company v. Ross & others*, 23 Ind. 179, Ray, Ch. J., delivered the following opinion: Complaint upon a policy of insurance, executed by the appellant to the appellees, bearing date February 10, 1862, by which it was agreed to make good to Ross, Shirk, and Logan, who were partners in trade, as is averred by the complaint, all loss or damage not exceeding \$2,250, which should happen by fire to their pork and slaughter-house during the term of nine months from the date of said policy. The complaint, after setting forth the policy, contained the usual averments, showing the payment of premium and compliance with the conditions of the policy on the part of the insured, and that the pork and slaughter-house, with all its fixtures and appurtenances, was destroyed by fire on the 5th day of November thereafter.

The appellant filed an answer, to the second paragraph of which answer the appellees filed a demurrer. This demurrer was sustained by the court, and by exception and appeal this ruling is presented for review.

This paragraph of the answer averred that Logan, one of the assured, had sold and transferred his interest in the property insured, after the policy issued and before the loss occurred, to Shirk, one of his partners, without the consent of the insurance company.

By the fourth condition of the policy, it is provided "that in case of any sale,

transfer, or change of title of any property insured by this company, or any undivided interest therein, such insurance shall be void and cease."

In construing the provisions of an insurance policy, it is urged "that the courts have adopted very rigid rules of construction against insurance companies," and "that such provisions, covertly included as means of escape in case of accident, are strictly construed."

We regret that counsel have been able to cite authorities for such a position. By what legal logic the conclusion has ever been reached, that the printed conditions of a policy of insurance are "covertly included" in the policy, we have never understood. The rules for construing written instruments are well established, and their application cannot depend in this court upon the parties to the contract.

The object of the condition in the policy of insurance is evident. Each party to the contract is interested in knowing with whom the engagement is made. The insured looks to the reputation for responsibility, promptness, and fairness of the corporation. The insurers look, with an interest as earnest, to the integrity and business capacity of the insured, — to the motive prompting the insurance. To them the contract is peculiarly a personal one; and the condition of the contract is, that the persons with whom they enter into it shall remain the same. When the instrument was executed, they depended

¹ *Ante*, vol. 2, p. 501.

² *Ante*, vol. 3, p. 36.

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upon a certain amount of caution, skill, and forethought in the care of the property, and they perhaps relied upon the moral honesty of some one or all of the insured to resist, in the future, any temptation to permit the destruction of the property, should it prove an unprofitable investment. Any change of interest may prove destructive of the prime motive for the contract. The introduction of a new partner may also introduce a dangerous element; the retirement of one member of the firm, or of one owner in the property, may withdraw also the personal integrity or the skilful care that induced the insurance.

It is insisted, however, by the appellees, that the answer should also aver the sale and transfer of the interest to have been made with the knowledge and consent of Ross, the other partner, unless the loss resulted from such transfer. The insured undertook that the conditions of the policy of insurance should not be violated.

They contracted with the corporation that no one of their number should sell or transfer his interest in the property; they contracted also for certain reasonable care in preserving the property. If one of the parties, by neglect of such care, caused the destruction of the building, are the insurers required to have the consent of the others to such neglect? And if a clear violation of a condition upon which the validity of the policy depends be shown, it is not to be insisted that loss must result from such violation to enable the company to defend. They may stand upon the express terms of their bond.

The view adopted in this case accords with the weight of authority. The decision of the supreme court of Illinois, in the case of *Dix v. The Mercantile Insurance Company*, 22 Ill. Rep. 272, *supra*, was to the same effect. Dix, Sinclair & Harris insured their stock, and afterward, and before loss, Sinclair sold and transferred his interest to Dix & Harris, and the loss occurred while they continued owners. The condition declared the policy void "in case of any transfer or change of title in the property insured by the

company, or of any individual interest therein." The court say: "Here was a transfer by one of the insured to the others of his *undivided interest* in the property insured. There is a change of title to an undivided interest in the property. At the date of the policy it belonged to Sinclair; at the time of the loss it was the property of Dix & Harris; so that there was a complete transfer and change of title to this undivided interest." See, also, 1 Selden Rep. 405, *Tillou v. The Kingston Mutual Insurance Co.*; ¹ *Horsie v. The Providence Mutual Fire Insurance Co.* 6 R. I. Rep. 507; ² *Baltimore Fire Insurance Co. v. McGowan*, 10 Md. Rep. 47.³

In the case of *Finley v. The Lycoming County Mutual Insurance Company*, 30 Penn. St. Rep. 311,⁴ an insurance was effected by Finley & Stanley, partners. The charter of the company provided that, "when property insured by this corporation shall be alienated by sale or otherwise, the policy shall thenceforth be void." The same condition was inserted in the policy. Finley, after the insurance, sold all his interest in the property insured to Stanley, without notice to the company.

The court say: "It is said by the defendants in error that this was not a case to which these conditions attached; that the property insured was partnership property; that it remained in original hands; and that the transfer by Finley was but a release of his interest to Stanley. This is neither a sound, legal, or practical view of the question. The stipulation regards alienation by 'sale or otherwise.' If what took place between Finley and Stanley passed the interest in the property of the former to the latter, then it was within the terms of the condition, — it was alienation by sale; but if not, it was alienation 'otherwise.' It was against alienation the prohibition levelled, and the mere use of terms will not defeat the intent; that a sale by one partner to another is within the prohibition cannot be doubted; there is no exception in its favor in the instrument, and the terms used give no room to imply any.

¹ *Ante*, vol. 3, p. 238.² *Post*, p. 484.³ *Post*, p. 428.⁴ *Ante*, p. 330.

When Contract complete.

By the transaction the one parted with all his interest, and the other acquired double what he previously possessed. This is a legitimate consequence of sale and purchase, and no substitution of terms will make it anything else. This was fully affirmed in the case cited from 1 Selden — *Tillou v. The Kingston Mutual Insurance Company*. And the question arose there upon a precisely similar condition, and after a transfer by one partner to another. We have no authority in our reports on the point, but consider the case cited as authority, being directly on the issue, and fully determining this part of the case against the plaintiffs."

It has been held by the same court, in

a more recent case, that "a transfer by one tenant in common to a co-tenant, or from one partner to another, is within the prohibition of a policy of insurance, which declares that alienation by sale or otherwise shall forfeit the policy." *Buckley v. Garrett*, 11 Wright, 280.

Upon principle and authority the answer must be held, its truth being admitted, as a bar to the action.

The case is reversed, with costs, and the court below is directed to overrule the demurrer to the second paragraph of the appellant's answer.

See further, upon this subject, note to *Murdock v. Chenango Ins. Co.*, ante, vol. 3, p. 36.

WHITAKER vs. FARMERS' UNION INSURANCE CO.¹

(Supreme Court, New York, May, 1859.)

When Contract complete.

On the 28th of March, 1856, the agent of an insurance company called at the house of the assured and proposed to insure it. A written application was made, and signed by the assured, and a receipt given to him by the agent, acknowledging payment of premium. The premium was not actually paid at that time, but it was agreed that the assured might hand it to the agent at his convenience. The assured was also told that his contract of insurance was complete from the date of the receipt, and that his policy would soon be ready. The receipt was dated March 28, 1857; the house was burned April 7, following, and the furniture wholly or partially destroyed. The premium was sent to the agent immediately after the fire, and he accepted the money, not knowing of the fire. The company made out, and sent a policy to the agent, but having heard of the fire, directed the agent not to deliver it, but to refund the premium. The agent declined to deliver the policy, and tendered back the premium, which the plaintiff declined, and thereupon brought suit for specific performance. *Held*, that the contract was binding from the 28th March.

By the Court, BALCOM, J. The plaintiff's application for insurance was dated the 28th day of March, 1857, and the agreement to insure was made on that day; but the \$36.50 premium, agreed to be paid for the policy, was not then paid, although the receipt taken by the plaintiff of the defendant's agent states that it was then paid. The receipt states the policy was to take effect on the day above mentioned, at noon. The property that the defendant agreed to insure was a house and the furniture in it. The same was burned in the night of the 7th of April, 1857. The plaintiff, by his agent, Hotchkiss, paid to the defendant's agent the premium for the insurance on the 8th of April, 1857, without

¹ 29 Barb. 312.

When Contract complete.

disclosing the fact that the house and furniture had been burned; and the defendant's agent, in ignorance of that fact, then sent the plaintiff's application for insurance, and the \$36.50 premium to the defendant; and the defendant immediately forwarded a policy in due form, in accordance with the application, to its agent, for the plaintiff. The policy insured the house and furniture from noon of the 28th day of March, 1857. The defendant's agent learned of the burning of the house and furniture before he received the policy, and refused to deliver it to the plaintiff. He returned it to the defendant, and tendered back the premium to the plaintiff, who refused to take it.

I have no doubt but that the policy would have been delivered to the plaintiff, and been regarded by the defendant as binding from noon of March 28, 1857, if the house and furniture had not been burned in the night of the 7th of April. And had it been delivered it would have been valid from the time it was made to take effect. *Hallock v. The Commercial Ins. Co.* 2 Dutcher (N. J.), 268; ¹ 4 Cowen, 645. The defendant should not be permitted to say the policy would have been good from the 28th of March, 1857, if no fire had occurred, but is void because there was a fire on the 7th of April of that year, and be allowed to repudiate its agreement to insure. When the defendant accepted the premium, and forwarded the policy to its agent, the agreement to insure was complete and ratified as of the 28th of March, 1857; and the policy became the property of the plaintiff. 2 Dutcher, 278, 279, and cases there cited.

The judge before whom the action was tried has found that there was no fraud or concealment on the part of the plaintiff; and I think the plaintiff was under no legal or moral obligation to inform the defendant, or its agent, of the fire, before or at the time the premium was paid; for the agent had received the application for the insurance, and given the plaintiff credit for the premium, according to the finding of the judge upon the evidence. 2 Dutcher, 274. The plaintiff was entitled to have his application for insurance acted upon by the defendant, after the fire, in precisely the same manner that it would have been if no fire had occurred.

One of the conditions of the policy issued by the defendant for the plaintiff was, that no insurance should be considered as binding until the actual payment of the premium, and for this reason

¹ *Ante*, p. 195.

Ultra Vires. — Powers of Manager.

the defendant's counsel insists that the agreement to insure, made by the agent of the defendant, was invalid. Now, granting that the defendant may have refused to fulfil the agreement on that ground (as to which I will express no opinion), it did not do so, but ratified it by accepting the premium and issuing the policy which insured the house and furniture from the time the agreement was made. And, as has already been seen, the plaintiff was not bound to inform the defendant, or its agent, that his house and furniture had been burned; and that an agreement to insure from a time past is valid. It follows that the defendant was properly adjudged liable to specifically perform the agreement to insure by delivering the policy to the plaintiff, and to pay the damages the plaintiff sustained by reason of the fire.

The defendant's motion for a new trial should therefore be denied, with costs.

CAMPBELL, J., concurred in the above opinion.

MASON, J., expressed no opinion in the case.

New trial denied.

Sed quare, see Tarleton v. Staniforth, Minn. 448; Markey v. Mutual Ben. Life Ins. Co. 103 Mass. 92; St. Louis Ins. Co. v. Phoenix Life Ins. Co. 17 Minn. 153; v. Kennedy, 6 Bush, 450; Hoyt v. Mutual Schwartz v. Germania Life Ins. Co. 18 Ben. Life Ins. Co. 98 Mass. 544.

MONTREAL ASSURANCE CO. vs. ELIZABETH MCGILLIVRAY.¹

(Privy Council, June, 1859.) *Ultra Vires. — Powers of Manager.*

The Montreal Assurance Company was incorporated by the Canadian Ordinance, 4th Vict. c. 37, and the statute, 6th Vict. c. 22. By section 4 of the latter statute it was provided, that all policies of insurance should be subscribed by three directors, countersigned by the secretary and manager, and under the seal of the corporation. By a by-law of the company, made in conformity with the powers conferred by the ordinance and statute, a resolution to the same effect was passed.

H. mortgaged a house in Lower Canada to R. Some time afterwards, R.'s representative being dissatisfied with the security, applied for repayment of the mortgage money, when H. agreed to insure the mortgaged premises in a certain sum for the benefit of the mortgagee's representative. In pursuance of this arrangement, H. applied to the Montreal Assurance Company, through M., their manager and agent, to insure the premises against fire. H. was unable to pay the premium, and proposed to M. that the company should take his promissory note, payable in twelve days. This was agreed to by M., and a promissory note given, M. at the same time promising to send the policy. The particulars of the policy were entered in the books of the company, but the note being dishonored when due, the entry was erased. The policy was never issued. Shortly afterwards the premises were burned down. *Held* (reversing the judgment of the court of queen's bench in Canada), first, that the powers of M., as manager, being public, must be taken

¹ 13 Moore P. C. 87.

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to have been known to H., the insurer, and that the acts of M. in the transaction were *ultra vires* and void, not being within the scope of his general authority as manager, and, therefore, not binding upon the Montreal Assurance Company.

Second, that as such a contract was not binding on M.'s principals, it did not become binding upon them by reason of its having been entered into through the medium of M., their agent, his powers of agent being restricted by the limitation of the powers of his principals.

Whether a verbal contract of insurance against fire is good by the law of Lower Canada, *quære?*

FRANKLIN FIRE INS. CO. vs. JOHN COATES & WM. C. GLENN.¹
(Court of Appeals, Maryland, June Term, 1859.) *Preliminary Proofs. — Waiver. — Lien. — Misrepresentation.*

The refusal of an insurance company to pay the amount of the loss, upon the ground that they were *not upon the risk*, is a waiver of the preliminary proof required by the policy. The *lien* upon buildings held by material-men, under the mechanics' lien laws of this state, is an insurable interest in the property.

The material-man has a subsisting lien in the intermediate time between the furnishing of the materials and the expiration of the six months limited by the law for filing his claim, though no claim has been filed by him.

A condition in an insurance policy, that it shall be void if the party insuring his buildings or goods "shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than is herein proposed," relates to a misdescription of the property, and not to the character of the title or interest in it.

The materiality of the disclosure or concealment by which a policy is to be rendered void is a question of fact, which must be submitted to the jury, and a prayer omitting to do so is, for this reason, defective.

WILLIAM T. ELLIOTT vs. HAMILTON MUTUAL INSURANCE CO.²
(Supreme Court, Massachusetts, June, 1859.)

Misrepresentation. — Use of Premises.

An application for insurance, in which the applicant agrees that it is "a correct description of the property, so far as regards the condition, situation, value and risk on the same," and that "the misrepresentation or suppression of material facts shall destroy his claim for damage or loss," is not a warranty of the truth of the answers to interrogatories in it, except so far as they are material to the risk; although the by-laws, to which the insurance is expressly made subject, provide that the application shall be held to be a part of the policy and "a warranty on the part of the assured," and that "unless the applicant shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, the policy shall be void." And the materiality of any answer is to be determined by the jury.

An application for insurance on a stock of goods represented that it was "all of goods usually kept in a country store," and that there was no "cotton, or woollen waste, or rags, kept in or near the property to be insured." The by-laws, to which the insurance was expressly made subject, provided that no building in which cotton or woollen waste or oily rags were allowed to remain at night should be insured; and that all cotton, woollen, hempen, or oily waste or rags should be destroyed or removed every evening. *Held*, that

¹ 14 Md. 285.

² 13 Gray, 139.

the keeping of clean white cotton rags, if usually forming part of the stock of "a country store," did not avoid the policy.

ACTION OF CONTRACT upon a policy of insurance on the plaintiff's stock of goods in his shop in Meredith Village, N. H., "under the provisions, conditions, and limitations of the charter and by-laws of said company." Upon the face of the policy was this clause: "This policy is accepted by the insured, subject at all times to the conditions and regulations of the act of incorporation and by-laws of said company for the time being in force, which conditions and regulations are hereby declared to form a part hereof."

The by-laws contained these provisions: "Art. 6. The application upon which a policy is founded shall be held to be a warranty on the part of the assured, and as absolutely a part of said policy and of the contract of insurance as if it were actually incorporated therein in full."

"Art. 13. Unless the applicant for insurance shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, or the value of the property, the policy issued thereon shall be void."

"Art. 28. No building in which cotton or woollen waste or oily rags are allowed to remain at or during the night shall be insured in this company. All damaged cotton or hemp, and all cotton, woollen, hempen, or oily waste, or waste used about oils or mineral acids, or rags, shall be destroyed or removed to a safe distance from the premises insured, or to some place fire-proof, every evening before dark."

At the head of the application for insurance was this notice: "No building will be insured by this company where cotton waste is kept." The application contained numerous printed questions and written answers, among which were these: "8. Is cotton, or woollen waste or rags kept in or near the property to be insured?" Answer. "None." "9. Of what does the stock in trade on which insurance is desired, consist?" Answer. "All of goods usually kept in a country store." Above the applicant's signature were printed these provisions: "And the applicant covenants and agrees with said company that the foregoing is a correct description of the property requested to be insured, so far as regards the condition, situation, value, title, and risk on

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the same ;" "that he holds himself bound by the act of incorporation and by-laws of said company ;" and "that the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss."

At the trial in the court of common pleas in Essex, before Mellen, C. J., the plaintiff, who was the only witness examined on either side, testified that his business was "that of an ordinary country variety store ; that from the date of the policy until the fire, it was a part of his business to buy clean rags, in small quantities, and keep them until they amounted to some hundred or two hundred pounds, when he sold them ; that at the time of the making of the application there were no rags on the premises or in the store, the last, amounting to some two hundred pounds, more or less, having been sold some days previous ; that, about the time he cleared out his stock, he made a bin for the purpose, among other things, of putting rags in, which he afterwards used for that purpose ; that after the issuing of the policy, rags were again taken into the store until the time of the fire, so that at the time of the fire he had about two thousand pounds in the store ; that they were all clean, white rags ; and that, in the ordinary course of business, rags were not kept, except for immediate sale."

Upon this proof, the defendants contended that the answer to the eighth interrogatory in the application constituted a warranty, not only that no rags were kept in or near the insured property at the time said application was made, but also a warranty that none should be kept there during the continuance of the policy ; and that the keeping of rags on the premises, as disclosed by the evidence, after the making of the policy, was a breach of said warranty, and avoided the policy.

The plaintiff controverted this position, and contended that said question and answer amounted, at the most, to a warranty that no rags were kept on the premises at the time when said policy was made ; and that, in the absence of fraud (which was not suggested), the policy would not be avoided by keeping rags there afterwards.

The plaintiff also contended that said interrogatory did not apply to clean white rags, but that the word "rags" should be construed according to the words used in connection with it ; and he offered to prove that "cotton and woollen waste" was a pe-

culiarly hazardous article, being the waste of manufacturing establishments, generally oily and dirty ; and also offered to prove, by the testimony of persons acquainted with insurance business, that the word "rags," used in this connection in an application for insurance, would be understood as applying only to oily rags, or rags used about machinery, and not to clean rags. But the court rejected this evidence, and ruled that, as matter of law, the word applied to clean, as well as to oily or dirty rags.

The plaintiff then contended that in fact he did disclose to the defendants that clean rags formed part of his ordinary stock in trade ; and offered to prove that clean rags are uniformly part of the stock of "goods usually kept in a country store," precisely as these were kept ; and claimed the right of submitting to the jury the question, whether or not, taking the whole application together, and more particularly the eighth and ninth answers, the fact that rags were part of his stock in trade was disclosed. And he tendered parol evidence to explain this answer, by showing that it was equivalent to saying "all the goods usually kept in a country store, to wit, hardware, groceries, dry goods, rags," &c. But the court rejected all this evidence ; and ruled that no question of fact was open upon the construction of this application, and that the answer to the ninth interrogatory did not affect the construction to be given to the eighth answer.

Upon the construction of the eighth interrogatory and answer, the plaintiff contended that, if they were to be considered a continuing warranty, he had only warranted that things should remain substantially as they were, and not that there should be absolutely no variation ; and that, in order to avoid the policy, the defendants must show that there had been a substantial alteration, affecting the risk, and he offered to prove, by the testimony of experts, that clean rags were not hazardous, nor deemed to be such by underwriters, and that the risk was no greater with these rags than without them.

But the court excluded this evidence also, and stated that the jury would be instructed, "that this application (being made part of the policy) contained a warranty that no rags, of any kind, were kept in or near the insured property, either for storage or for sale, and an agreement that none should be so kept ; that if it was part of the plaintiff's business, from a time prior to the making of the policy until the time of the fire, to

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take in rags, either for storage or on sale, and keep them till they amounted to, say one hundred pounds, and then to sell them, even though he had none when the application was made, then there was a breach of that warranty, the policy did not attach, and the plaintiff could not recover; and that it was immaterial whether the risk was greater by reason of the introduction of these rags, or whether they in fact caused the fire."

The plaintiff thereupon submitted to a verdict for the defendants, and alleged exceptions, which were argued in *Essex*, at November term, 1858.

BIGELOW, J. The rulings of the court at the trial of this case were erroneous in several particulars.

The plaintiff, by his answers to the questions contained in the application, does not warrant that they are literally and absolutely true. Such might be the rule if they stood alone, unexplained by other stipulations in the application. But the whole paper is to be construed together, and effect is to be given to all its parts, if it can be done consistently with a fair and reasonable interpretation of the contract. We think the answers are qualified by the agreement which immediately follows them, and that the extent to which the assured is to be held responsible for their accuracy and truth is clearly indicated and fixed by the stipulation which he there makes. He agrees that the description of the property contained in his answers is correct only "so far as regards the condition, situation, value, title, and risk on the same," and "that the misrepresentation or suppression of material facts shall destroy his claim for damage or loss." These stipulations were not only unnecessary, if the assured was to be held to the literal and exact truth of his answers, but are inconsistent with holding them to be strict warranties. The parties to the contract did not so regard them. It was only so far as they were material to the risk, or were misrepresentations or suppressions of material facts, that they were intended to affect the rights of the assured to recover on the policy. The plaintiff was therefore entitled to have the question, whether the rags kept in the store at the time of the fire materially affected the risk, passed upon by the jury.

This case differs from *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray, 415, and 8 Gray, 38.¹ In that case, the misrepresentation relied on related to the amount of incumbrances on the

¹ *Ante*, pp. 1, 167.

 Warranty.

property, and affected only title of the party insured. The covenant at the end of the application did not extend to representations concerning the title, but only to those affecting "the condition, situation, value, and risk of the property;" the amount of incumbrances could hardly be material to the risk, and the by-laws expressly provided that the policy should be void unless the true title of the assured was expressed in the application. The assured in that case, therefore, were properly held to the strict truth of the statements as to the amount of incumbrances.

The construction put on the eighth interrogatory by the court was incorrect. If interpreted literally and according to the punctuation, as printed in the application, it would include only "woollen rags," and not those made of cotton. But if the latter are comprehended within the fair scope of the question, we think it can extend only to those which, from their nature or condition, are easily inflammable, and for that reason classed with "cotton and woollen waste." Clean white rags would not come within this description. This view is confirmed by the twenty-eighth article of the defendants' by-laws, annexed to the policy, in which it is provided that "no building in which cotton or woollen waste or oily rags are allowed to remain over night shall be insured by this company." We think it reasonable to infer that the eighth interrogatory was put with special reference to this clause in the by-laws, and that it is to be construed in connection with it as including only "oily rags."

It follows, that it was competent for the plaintiff to show that clean white rags commonly formed part of the stock of country stores, and that in this respect he had complied with the statement made in answer to the ninth interrogatory, by which his stock was described as being that which was usually kept in a country store.

Exceptions sustained.

EDDY STREET IRON FOUNDRY vs. HAMPDEN INSURANCE CO.¹
(Circuit Court of United States, Rhode Island, June Term, 1859.)

Warranty.

When a policy of insurance contains a clause declaring that the application forms part of the policy, it thereby becomes part of the contract, and the material statements in the answers of the applicant are thereby changed from representations to warranties.

A warranty is a stipulation forming part of the contract, and is construed as a condition.

Warranties, unless strictly complied with, will invalidate the policy whether or not they are material to the risk.

¹ 1 Cliff. 300.

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Where property described as contained in a certain building was insured, that description, being made part of the contract, is material, and the insured cannot recover for the loss by fire of such property while in the building other than the one just described.

FIRST BAPTIST CHURCH *vs.* BROOKLYN FIRE INSURANCE CO.¹

(Court of Appeals, New York, June, 1859.)

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The declaration alleged an agreement to renew a policy of insurance from year to year in consideration of an annual premium: *Held*, that such agreement need not be in writing. A verbal contract to insure at common law is valid; and *held*, that there was nothing in the defendants' charter forbidding such contracts; the tenth section of the charter (which was principally relied on) merely declaring that the contracts of the corporation, without the corporate seal, if signed by the president and countersigned by the secretary, should be binding. Nor was it otherwise by reason of the fact that in the body of the policy it was declared that the insurance might be continued for such further time as should be agreed upon "provided the premium therefor was paid and indorsed on the policy, or a receipt given for the same."

THE case is stated in the opinion.

COMSTOCK, J. The alleged agreement on which the suit is founded was to renew a policy of insurance from year to year in consideration of a premium to be annually paid, either party being at liberty to give notice at any time that the arrangement would not be continued. Such an agreement, although not in writing, is not void by the statute of frauds, on the ground that "by its terms it is not to be performed within one year from the making thereof." 2 R. S. 135, § 2. It is not the meaning of the statute that the contract must be performed within a year. If it can be so performed consistently with the language in which the parties have expressed themselves, — in other words, if the obligation of the contract is not by its very terms, or necessary construction, to endure for a longer period than one year, — it is a valid agreement, although it may be capable of an indefinite continuance. An agreement, which either party can terminate at any time by a notice to the other, may be binding so long as the notice is not given, but it is not within the language or policy of the statute. *Plimpton v. Curtiss*, 15 Wend. 336; *Moore v. Fox*, 10 John. 244; *Fenton v. Embler*, 3 Burr. 1278; 2 *Parsons* on Con. 316, and note.

Aside from the objection just considered, contracts of insurance, whether executory or importing a present risk, are not required by any statute to be in writing; and we are therefore next to

¹ 19 N. Y. 305.

inquire whether, if made by parol, they are valid upon general principles of law. A policy of insurance is a mercantile contract, having its origin in, and deriving its incidents from, the usages and laws of commercial nations. In many of the countries of Europe the contract is required to be in writing by positive ordinances, which set forth minutely the circumstances and the stipulations which it ought to express. 1 Duer on Ins. 61. The same is true of marine insurances in Great Britain, a written policy being required by the stamp act. 35 George 3, ch. 63. Such is also, undoubtedly, the usage in this country; and indeed the very term "policy" imports that the party insured holds a written instrument to which that name has been given. It seems, however, that even in the continental countries of Europe, where formal policies are required by the codes of public law, unwritten agreements to insure will, in some circumstances, be executed by the courts of justice. 3 Boulay du Paty, 246; 2 Valin, 20; Pothier, *Traité du Contrat d'Assurance*, n. 96, 97. In this state we have no positive law on the subject. The contract, as I have said, had its origin in mercantile law and usage. It has, however, become so thoroughly incorporated into our municipal system that a distinction which denies the power and capacity of entering into agreements in the nature of insurances, except in particular modes and forms, rests upon no foundation. The common law, with certain exceptions, having regard to age, mental soundness, &c., concedes to every person the general capacity of entering into contracts. This capacity relates to all subjects alike concerning which contracts may be lawfully made, and it exists under no restraints in the mode of contracting, except those which are imposed by legislative authority. There is nothing in the nature of insurance which requires written evidence of the contract. To deny, therefore, that parol agreements to insure are valid, would be simply to affirm the incapacity of parties to contract where no such incapacity exists, according to any known rule of reason or of law. The supreme court of the United States, in a recent case in which the question directly arose, has determined that a parol agreement to make and deliver a policy of insurance need not be in writing. *Commercial Mut. Marine Ins. Co. v. The Union Mut. Ins. Co.* 19 How. 318. We do not hesitate to adopt that conclusion, and it follows that the objection made at the trial to the agreement offered to be proved, so far as it rests upon this ground, cannot be maintained.

We come, then, to the question, whether the alleged parol agreement in this case was void by reason of any restraints contained in the charter of the defendants as a corporation. The defendants were chartered by an act of the legislature passed in 1824. Laws of 1824, ch. 166, p. 175. The first section of the act declares that the company "shall be in law capable [amongst other things] of contracting and being contracted with relative to the funds of the said corporation and the business and purposes for which the said corporation is hereby created as hereinafter declared." The second section declares "that the corporation hereby created is so created for the purposes aforesaid, and shall have power and authority to make contracts of insurance with any person or persons, body politic, or corporate, against loss, &c., for time or times, and for such premium or consideration, and under such modifications or restrictions, as may be agreed on between the said corporation and the person or persons agreeing with them for such insurance." The tenth section declares "that the policies of insurance, and other contracts founded thereon, thereafter to be made or entered into by the said corporation, though not under seal, if subscribed by the president . . . and countersigned by the secretary, shall be binding and obligatory upon the said corporation, and shall have the like force and effect to all intents and purposes, as if the seal of the said corporation had been or was affixed thereto."

The argument on behalf of the defendants is, that their charter, being the enabling act which alone authorized them to contract at all, and the tenth section having specified the mode of making contracts of insurance, all other modes and forms of making or agreeing to make insurance are necessarily excluded, and hence, that the parol agreement alleged to have been entered into with the plaintiffs was unauthorized and void.

It needs no argument or authority to prove that corporations must act within the powers conferred by the organic laws under which they are created. It may also, for the present purpose, be conceded that they can disaffirm the most solemn and meritorious engagements entered into by them in excess of those powers. These rules are not inconsistent with another, which is, that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of execution which a natural person may adopt in the

exercise of similar powers. The business of insurance, for example, is not, in its nature, a corporate franchise. Any person may engage in it, unless forbidden by law; and his contracts of that nature, whether by parol or in writing, as we have seen, will be valid. So when a general authority to engage in that business is given to a corporation in express terms, and there are no special restraints in its charter, it takes the power, as a natural person enjoys it, with all its incidents and accessories. It may bind itself in any mode and form of obligation which is not forbidden. If a private person can agree by parol to make insurance, so can a corporate body, unless the power of thus contracting is plainly denied by its organic law. That the use of the corporate seal to attest its contracts is unnecessary, has long been settled.

Referring now to the charter of the defendants, we find, in the provisions above set forth, an authority to make contracts of insurance conferred in the most general terms. Unless the power thus given is specially restrained in the tenth section, it can be executed in any manner and form which the corporation may approve, and by any agents whom it may authorize to contract in its name. The power is to make "contracts of insurance." These may be in writing or by parol. They may be in the form of undertaking, which imports a present risk completely assumed, or they may be executory, for the delivery of a policy or a renewal of a policy at a future day.

Does, then, the tenth section abridge the powers thus given, and confine the corporation to a particular mode of action, as well as to action through particular agents? We are clearly of opinion that it does not. This provision of the charter merely declares that the contracts of the corporation, without the corporate seal, and if signed and countersigned by the president and secretary, shall be valid and obligatory. Now, corporations always and of necessity act by agents; and, in granting their charters, it is a practice eminently convenient and proper, and, moreover, a very usual one, to specify the mode in which, and the agent or agents by whom, their contracts may be executed so as to bind the artificial body. Such a specification forecloses all question and doubt, and relieves the parties with whom contracts are thus executed from the burden of proving that the agents with whom they deal have acted by due authority. *Buckley v.*

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The Derby Fishing Co. 2 Conn. 252; *Safford v. Wykoff*, 4 Hill, 446, 447, per Walworth, Chancellor; *Barnes v. Ontario Bank*, 19 N. Y. 152. Such specifications do not subtract anything from the general powers which corporate bodies take under their charters. Within those powers, they may contract in other modes; and all the authority which they possess they may delegate to other agents. That the legislature may restrict them in these respects is not denied; but restrictions of such a nature are founded in no policy, and they are rarely, if ever, imposed. They clearly are not contained in the charter under consideration.

It is further contended, that proof of the alleged agreement was inadmissible, on the ground that it was opposed to the stipulations for renewal contained in the written policy originally delivered, and would be in contradiction of the terms of that instrument. In the body of the policy it was declared that the insurance (the risk not being changed) might be continued for such further term as should be agreed on, "provided the premium therefor was paid and indorsed on the policy, or a receipt given for the same;" and in the conditions annexed and forming a part of the contract, it was set forth that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium. These clauses of the contract cannot have the controlling influence which is claimed for them. A provision in a policy already executed and delivered so as to bind the company, declaratory of a condition that premiums must be paid in advance, manifestly has no effect except to impart convenient information to persons who may wish to be insured. As such a provision in the policy in question could have no effect upon the delivered and perfect contract in which it was contained, so it could have none to prevent the same parties from making such future contract as they pleased. In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol, and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand at a future day. Proof of such an agreement would have no tendency to contradict or to change the written policy already in force between the parties, and which would be wholly spent before the new agreement could take its place. This is too plain to require further elucidation.

The judgment must be reversed, and a new trial granted.

Judgment reversed, and new trial ordered.

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In *First Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153 (1863), this case came before the court of appeals again.

The case now presented certain questions as to the effect of admitting evidence of what was meant by a "permanent" policy, of an admission of the secretary of the company after the fire that the property was insured, of the agreeing to give credit for the premium, and of the effect of increasing the amount of premium previously paid upon the already existing verbal contract.

DENIO, C. J. This action was brought to recover the sum of \$5,000, alleged to have been insured by the defendants upon the plaintiffs' church edifice, which was consumed by fire in September, 1848. There was no written contract of insurance existing at the time the church was burned; but it had been insured one year from July 21, 1845, by a policy issued by the defendants at that date, and the instrument contained the usual clause that the insurance might be continued for such further time as should be agreed on, by the payment of the premium and by having it indorsed thereon, or a receipt given therefor. It had been continued by a renewal receipt for the following year; and before any further renewal the defendants had increased the premium from \$25, the former amount, to \$30, all but \$5 of which had been paid for a renewal from July, 1847, to July, 1848. A short credit had been given by the company for the payment of this balance, but the plaintiffs' treasurer had forgotten to pay it, and the renewal receipts for that year had not been delivered; and nothing had been done to procure a renewal for the following year, during which the loss happened; unless the alleged parol arrangement, upon which the plaintiffs relied, effected such renewal. To establish such arrangement the plaintiffs examined their treasurer, A. N. Lewis, who testified to a conversation with Mr. Ellsworth, the defendants' president, who called upon the witness at his place of business in the city of New York, two or three days

prior to the 21st of July, 1846, when the first year's insurance would expire. The witness's account of the interview is as follows: "Mr. Ellsworth said, 'Mr. Lewis, I suppose you know that your policy will expire in a day or two.' I told him I did; that I had intended calling at the office to pay the premium and renew the policy. He said, 'My object in calling is to ascertain whether your board of trustees does not intend to let this policy remain with us permanently; to keep it with our company.' I told him we did, decidedly. He said, 'I hoped so, and supposed so.' I then said I would call at the office and would pay the premium. He said he wished I would not give myself that trouble; that he would himself call upon me. I told him I wished to be kept insured. He said I need give myself no anxiety about the matter; that I need not call at the office; that he would attend to it himself; that he would bring me the renewal receipts himself, and would collect the premium from me. I said very well; we wish to be kept insured." Mr. Ellsworth was subsequently examined on the part of the defendants, and denied that at the interview referred to he had used the language mentioned by Lewis, which imputed an arrangement for the indefinite continuance of the insurance, and his calling for the premiums in future years. This outline of the case, with such further explanations as may be given, will enable me to examine the merits of the numerous exceptions taken by the defendants in the course of the trial, most of which are now relied on by the plaintiffs to reverse the judgment which was rendered on the verdict for the defendants.

The plaintiffs' counsel inquired of the witness, Lewis, what was meant by a *permanent policy*; and he excepted to the ruling by which the question was rejected. That phrase had not been used in any part of the testimony, and if it had been it would not have been competent for the witness to prove its meaning, as it does not appear to have been a term of art, or one employed in any particular business,

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or that the witness had any qualifications for interpreting it which were not equally possessed by the judge and jury.

The testimony of A. G. Stevens, who was the defendants' secretary at the time of the transactions in question, who had been a witness on a former trial of the cause, was given in evidence by the defendants, he having since died. The following portion of that testimony was permitted to be read against the objection of the plaintiffs' counsel: "There never was any renewal of the policy in question from the 21st of July, 1848, application for renewal thereof, or premium paid. No act whatever to renew after July, 1848. No demand of the premium made, nor renewal certificate issued, or given, after 21st July, 1848, nor any made out before or after that date for the continuance of the policy after that time." The exception is stated to embrace every sentence of the part extracted. The witness, as secretary, had charge of the company's office, which was in Brooklyn, and must be supposed to have had knowledge of all the books and papers kept there which related to the alleged insurance. He must also be assumed to have spoken only of facts within his own knowledge; for it would be unreasonable to suppose that his denial was meant to embrace facts which were alleged to have taken place between the president and Mr. Lewis, in New York. No ground for the objection is stated. Lewis had testified to an interview with Stevens at his office, in Brooklyn, in 1847, in which he stated that the latter had given him time for the payment of the five dollars wanting to complete the payment for that year; but it had not been, as I perceive, contended that an agreement for a continuing insurance had been made with him. It was natural that the defendants should wish to put at rest any inference that anything in the office, or within the knowledge of the secretary, tended to establish the alleged agreement. Strictly, the evidence was unnecessary and immaterial. If the objection had been put on that ground, it is to be presumed that it would have been excluded.

Immaterial evidence sometimes has a tendency to prejudice the party against whom it is given, but I can see nothing in this evidence which could possibly have had that effect. If the plaintiffs did not rely upon anything in the office, or within the knowledge of Stevens — and I think they did not — the positive proof of the absence of any such facts could not prejudice them. If, on the contrary, they did insist upon such facts, inferentially or otherwise, it was proper to disprove their evidence.

The defendants' counsel was also allowed to read a part of Mr. Stevens's deposition, in which he stated that the president had never reported to him the existence of such an arrangement as the plaintiffs attempted to prove, and that he had never heard of any renewal or agreement to renew the policy after July, 1848. The exception, based upon this ruling, does not specify any grounds. It falls, for the most part, within the same reason which has been given for disallowing the last exception. It may be added, that the court will so far take notice of the usual course of business as to assume that the office of an insurance company would contain a minute of all actual contracts of insurance, whether made at the office, or by its officers outside of the office. Besides, the books and registers of the office, for the time to which the controversy relates, were afterwards given in evidence, without objection, and they confirmed what the secretary had sworn to.

A portion of Mr. Stevens's former testimony was to this effect: that the company's insurances were from year to year, and they were not permanent as to time; but he, the secretary, had individually made arrangements with several persons, whom he named, that he would make out their renewal receipts when they were due, and would call upon them for the premium; and in such cases he took the receipts to them, and got the money within a week or a month afterwards; that in some instances he had left receipts without receiving the premium; and that there were some such cases existing at the

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time of the fire in question. The plaintiffs' counsel wished to give this portion of the testimony in evidence, but it was excluded on the defendants' objection, and the plaintiff excepted. If the objection depended upon the view of the witness, that the cases he spoke of were formal transactions, and did not affect the company, I should think the ruling erroneous. But the testimony was objectionable for a different reason. Evidence of such a loose practice by the secretary with the persons named did not really tend to show that the president had made the arrangement claimed with the plaintiffs' treasurer. It was not material, upon the question of the authority of the president, to make such an arrangement, for his power to do all that he had undertaken to do was expressly conceded. The only agreement which could be deduced from the testimony, if it had been received, would have been, that as the secretary was found making such informal arrangements, it was quite probable that the president had made the one claimed with the plaintiffs, though he denied it. This would not be either a logical or a legal deduction.

The only answer that Mr. Beers, the defendants' witness, gave to the question (which was allowed against the plaintiffs' objection), as to how often the plaintiffs' policy had been renewed, was, that it had been renewed twice, — in 1846 and 1847. The plaintiffs had claimed that such renewals had been made; and so far as the matter was material, the answer was favorable to the plaintiffs.

The plaintiffs' counsel proposed to prove by Mr. Beers that it was the usage of the company to send notices of the expiration of policies, even where there were agreements for permanent insurance, and the evidence was excluded. It had been proved without contradiction that a notice was sent to the plaintiffs' treasurer, in anticipation of the expiration of the renewal for the year terminating July, 1848. This did not prove, or tend to prove, that it was or was not a permanent policy in the sense in which that term was used in the

question, and I do not perceive that the usage suggested would have had any just influence upon the question. It was established that, so far as the office of the company from which the notices were issued was concerned, the insurance upon the church had not any other character than the ordinary policies, renewable from year to year by payment of premium and renewal receipts. The giving of the notice just before the commencement of the year during which the fire happened, was in conformity with the state of things appearing in the office, and the practice of the company. It was not material what would have been done if another state of things had existed there.

The fire occurred on a Sunday morning. The following Monday morning Mr. Sandford, a trustee of the church, and Mr. Lewis, the treasurer, went to the company's office and had a conversation with Mr. Stevens, the secretary. The plaintiffs' counsel wished to prove that he admitted on that occasion that the church was under insurance by the defendants at the time it was burned. Mr. Sandford had been examined on a former trial and had given testimony as to what took place at that interview, and had since died. According to this testimony, which the plaintiffs wished to read, Lewis said to Stevens, "I understand that you reject the policy on our house." Stevens answered, "We do not reject our policies." Something more was said which the witness stated he paid little attention to. The plaintiffs' counsel proposed to give this former testimony in evidence, but it was excluded on the defendants' objection. It would be a sufficient answer to the exception to this ruling, that the evidence did not amount to an admission of an insurance. It was rather a denial that any policy existed. It was excluded, however, apparently on the ground of irrelevancy. But the plaintiffs thereupon recalled Lewis, and broadly offered to prove by him that "Mr. Stevens, the secretary of the company, acknowledged [on that occasion] to him and Mr. Sandford, at the office of the company,

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that the church was insured at the time of the fire." It appeared that Stevens's attention had been called to that interview on the former trial, and he had sworn, in effect, that so far from admitting an insurance, he had stated that the church had not been insured since July then last past. The judge excluded the testimony offered to be given by Lewis, and an exception was taken, which presents a closer question than any of the preceding exceptions. As principal evidence it was incompetent, being the declaration of a third person, who, though an agent of the defendants, was not then engaged in the performance of an act relating to his agency, so as to bring the case within the rule which allows the declarations of an agent as part of the *res gestæ*. It was not competent for the purposes of disproving Stevens's denial of the alleged admission, for an issue cannot be raised upon an answer to a question put to affect a witness's credibility. The only question is, whether it was not competent as a contradiction of his testimony in which he said that there was no insurance. There is no doubt but that if a witness testify to the existence of a material fact within the issue, the opposite party may show that he has, out of court, made a contradictory statement as to that fact, with a view to affect his credit. *Patchin v. The Astor Mutual Ins. Co.* 8 Kern. 268. His attention must first be called to the alleged conversation, which was sufficiently done in this instance. But was the testimony to which the alleged contradiction was offered material? I have already said it was not. It was conceded upon the pleadings and throughout the case, that there was no written contract of insurance for the year in which the church was burnt, and it was not pretended that there was any verbal arrangement made with Mr. Stevens. The only one attempted to be established arose out of the conversation between Lewis and Ellsworth in New York, to which Stevens was not a party, and of which it does not appear that he had any knowledge. I think this case does not

therefore fall within the rule which has been mentioned, and that the ruling was correct.

The remaining exceptions relate to the instructions to the jury. The plaintiffs desired them to be charged positively that the church was insured for the year ending in July, 1848, which was the year prior to the fire. The fact was not directly material, though it may have been argumentatively. The instruction given was that, if a credit was given for the five dollars, the unpaid balance of the premium, the policy attached for that year. Only \$25 of the \$30 charged for the premium had been paid. The secretary had, according to the testimony, promised to pay that balance in a short time, and had forgotten it. This amounted to giving credit for that amount, and, if the jury believed the evidence, the insurance, according to the judge, was perfect for that year. I think there was no error here.

The judge stated to the jury in a general way what was essential to constitute a valid contract of insurance, namely, that the minds of the parties should meet as to the premises insured and the risk; as to the amount insured; as to the time the risk should continue; and as to the premium. The plaintiff excepted generally, without indicating what part they found fault with, or that they desired any qualification to be stated. I think the definition given a very accurate one, and that there was no error in laying it down.

The judge charged, in effect, that the verbal arrangement relied on must be understood as a contract to reinsure the church from year to year, at the premium charged in the policy which was running at the time the arrangement was made; and that if a different premium was subsequently exacted and assented to, it put an end to the prior arrangement, and required a new bargain to effect a continuing arrangement. The plaintiffs do not contend that the effect of the arrangement was that the defendants should perpetually insure them, or

Non-disclosure. — Failure to repair. — Causa proxima.

that they would through all time be insured by the defendants. As they construe it, and as the reasonable interpretation would be, if the arrangement claimed was made, it was an understanding that until one of the parties dissented, the contract should be continuous, and the president should call for the premium when he thought proper, after it was due. In 1847, the president offered to the plaintiffs' treasurer, at the place of business of the latter in New York, a renewal receipt for the year which would end in July, 1848, claiming a premium of \$30 instead of \$25. The treasurer declined to pay the \$30, and he swears that the president insisted that it was the same which had been paid the year before, and that it was not intended to change the amount. It was agreed, as he says, that he should look up the former receipt and go to the office of the company. This he did, and the secretary refused to renew at less than \$30, and the plaintiffs' treasurer assented to the change, paid the \$25, which was all he then had with him, and promised to pay the balance. The point of the exceptions is, that the arrangement of 1846 was for a continuous insurance, limited as above stated, at such premium as should be from time to time charged by the company, and that a refusal by the defendants' officers to go on at the former rate of premium and the exaction of a higher

rate did not amount to a disaffirmance of the arrangement, but only to a modification of it. The judge's view was that a refusal by the company to renew at the former premium put an end to the arrangement. The question is not free from difficulty. I am, however, led to the conclusion that the arrangement, if one existed, such as was sworn to by Mr. Lewis, was an entire contract, embracing all its provisions, and that one of those provisions looked to an insurance at the then existing rate of premium. It is clear that the officers refused to insure any longer at that rate, and that Lewis, representing the plaintiffs, agreed to pay the additional amount charged for the year ending in July, 1848; but he never did make that payment; and he never in any way agreed that in future years he would pay the increased premium. I think, therefore, that the judge was right in holding that the change of premium terminated the arrangement between Lewis and Ellsworth made in 1846, and that it required a new understanding to enable the plaintiffs to rely upon being called upon on behalf of the company, instead of the usual method of taking out their renewal receipts as they were needed.

I am, therefore, in favor of affirming the judgment of the supreme court.

Judgment affirmed.

HENRY P. WHITEHURST vs. FAYETTEVILLE MUTUAL INSURANCE CO.¹

(Supreme Court, North Carolina, June Term, 1859.)

Non-disclosure. — Failure to repair. — Causa proxima.

Where specific descriptions of the property are required by the terms of an insurance office, which are referred to, and incorporated as part of the conditions of the policy of insurance, *held*, that the suppression of an immaterial fact does not invalidate the policy.

The failure of the insured to repair a defect in the property, arising *after* the contract was made, unless he be guilty of gross neglect, does not work a forfeiture of the plaintiff's right to recover on the policy.

Losses arising from *bond fide* efforts to extinguish fire, such as wetting and soiling of goods and losses by theft, consequent on their removal, are fairly within the contract to insure against fire.

¹ 6 Jones (N. Car.), 352.

Non-disclosure. — Failure to repair. — Causa proxima.

ACTION OF COVENANT on three several policies of insurance against fire, tried before Manly, J., at a special term (January, 1859), of Craven superior court.

The policies declared on were admitted by the defendants. It was therein covenanted, that the company should, on certain terms, mutually insure the property of each of its members against fire. A part of the covenant in each was that a true description should be given of the property insured in an application filed, and that such description should become a part of the policy. The policies were effected upon "goods and merchandise" contained in a building in the town of New-Berne, and in the plaintiff's application for insurance a part of the description of the building is as follows: "36 × 25. One chimney, no fire-places, one stove. Pipe enters chimney from second floor; ashes and pipe properly secured." It was proved that the storehouse described in the application containing the goods took fire during the time stipulated for insurance, but was not entirely consumed. It was extinguished in about half an hour after it commenced burning. This was effected by throwing large quantities of water upon the burning storehouse, both inside and outside of the building, part of which fell upon the insured goods and wetted and soiled them very materially. It was proved that the building was in great danger of being entirely destroyed by the fire, and in order to rescue it, many of the inhabitants of the town assembled around, and used the means stated for its preservation, and that these means were proper and necessary for that purpose. It was proved, also, that during the progress of the flames great tumult and disorder prevailed; that the goods were removed out of the house, — some into the streets, and some into adjacent buildings, with great haste and precipitation, during which period they were wetted and damaged as stated and some of them stolen and not recovered. It was also proved that the plaintiff and his wife were present at the fire, and made every exertion in the removal and preservation of the goods. None of the goods of any value were destroyed by being burned. What remained of the goods, after the fire, were taken back into the storehouse and kept for sale by the plaintiff.

The defendant proved that previously to the year 1848 there had been a stove-pipe inserted into the chimney, mentioned in the plaintiff's application, which was removed, leaving a hole in the

Non-disclosure. — Failure to repair. — *Causa proxima*.

chimney about five or six inches in diameter, and that upon the removal of the pipe, this hole was closed in the following manner: the outer circumference thereof was enlarged and a piece of sheet iron cut to fit tightly therein, and sunk into the brickwork of the chimney about one inch and a half; that the iron was pointed upon the edges to hold mortar; that the hole in the inside was filled by mortar, the iron plate then laid and embedded therein, and then the front or outside space filled also with mortar, to the extent of an inch and a half. There was evidence that this work was done by an experienced and skilful mason, and that the hole, when thus closed, was as perfectly secure as if it had been done with brick and mortar, or any other material, and that the chimney, when thus repaired, was as secure as if no hole had been made therein. This hole was not mentioned in the application filed. It was further in evidence that, after the tumult had subsided, the iron was discovered to be displaced. There was evidence that the fire first took place in the room where the hole in the chimney was, while other testimony went to show that it took place in another part of the building. There was no evidence that there had been any fire in the stove or fireplace attached to the chimney. The court charged the jury "that if the plaintiff, in his said application, misrepresented the premises in any material particular, or failed to disclose any fact which would increase the risk of the defendants, and which, if made known, would have tended to prevent them from undertaking the risk, the policies would be void, and the plaintiff would not be entitled to recover; that it was not unconditionally necessary for the plaintiff to disclose the manner in which the opening for the stove-pipe had been closed, if it had been secured safely, *i. e.* as well as brick and mortar would have secured it. The court further charged the jury, that if, after the issuing the policies sued on, there was made any change or alteration in the premises or in any part thereof, which tended to increase the risk, and the plaintiff failed to communicate the same to the defendants, the plaintiff would not be entitled to recover. The court further charged the jury that if there was any defect in any part of the premises arising from accident or other cause after the issuing of the policies which the plaintiff knew of, or ought to have known of, which defect or imperfection the plaintiff failed to repair, and the fire took place from his gross negligence, the plaintiff would

Non-disclosure. — Failure to repair. — Causa proxima.

not be entitled to recover ; but such negligence must be extreme and reckless. The court further charged the jury, upon the question of damages, that if it was necessary to throw water on the fire to extinguish it, and the goods in the store were thereby wet and soiled, the damage thus done was covered by the policies, and the plaintiff was entitled to recover for the same ; and that if the storehouse was in imminent danger of being burnt, and the goods were removed therefrom for the purpose of preventing their destruction by the fire, and in so doing, and in consequence of such removal, the goods were injured or soiled and a portion of them stolen, the plaintiff would be entitled to recover damages to the extent of the loss which he thereby sustained. The defendant excepted.

Verdict for the plaintiff. Judgment. Appeal.

PEARSON, C. J. 1st. It is to be assumed from the verdict that the *hole*, which had several years before been made in the chimney for the stove-pipe, "had been secured safely, *i. e.* as well as brick and mortar would have secured it." The fact that the hole had been made was therefore immaterial, and the plaintiff was not required to disclose it.

2d. We concur with his honor in the opinion that the insured does not forfeit the benefit of the policy by failing to repair any defect arising *after* the policy issued, unless he is guilty of gross neglect in respect thereto. But we can see no evidence upon which the question was presented. The fact, that after the fire was extinguished "the piece of sheet iron" was discovered to be displaced, certainly did not establish negligence, in the absence of proof that it had been displaced *before* the fire. Indeed, the probability is, if conjecture may be resorted to, that it was knocked out during the tumult and confusion caused by the efforts to extinguish the fire and remove the goods.

3d. We also concur in the view taken as to the measure of damages. Throwing the water and removing the goods were acts done for the purpose of saving them, and the injury caused by the goods being thereby wet and soiled certainly constituted a part of the damage ; and we think the value of the goods that were stolen falls under the same principle, being a loss incident to the attempt to save them. For whose benefit was the attempt made ? For that of the defendants ; and as the goods that were saved were allowed in mitigation of the damages, the objection

Other Insurance. — Waiver.

that the portion of them that were lost ought not to be paid for, is made with an ill grace. Had the plaintiff and his wife, instead of exerting themselves in removing the goods, and putting them back, as soon as the danger was over, stood listlessly by and permitted them to be burnt up, they would have been obnoxious to the charge of gross negligence. Underwriters are liable when the fire is the act of an incendiary, and, *a fortiori*, are they liable for the depredations of thieves, who avail themselves of the exposure which is unavoidable on such occasions, and which is incident to the attempt to save the goods for their benefit.

Mr. Bryan cited no authority for the position that a member of a *mutual* insurance company had not the same rights under his policy that a third person has against an independent underwriter. We can see no principle upon which to base the distinction.

Per CURIAM.

Judgment affirmed.

HICKEY vs. ANCHOR ASSURANCE Co.¹ (Queen's Bench, Upper Canada, Trinity Term, 1859.) *Limitation Clause. — Pleading.*

Declaration on a policy of insurance alleged to have been sealed and executed by defendants. Plea, that the policy was subject to a condition that no action should be brought on it except within six months from the loss, and that the plaintiff did not sue within that time. Replication on equitable grounds, that when the loss occurred the defendants had not yet issued a policy to the plaintiff, although he had previously effected the insurance with them; that although requested they refused to execute the policy until after the commencement of this action; and that in consequence of such delay he was prevented from suing within six months, as he otherwise would have done. *Held*, that the replication was bad, as a departure from the declaration, and as showing in effect that the plaintiff was proceeding upon an equitable cause of action.

The defendants also rejoined, on equitable grounds, that long before the expiration of six months from the fire the policy was executed and ready for delivery to the plaintiff, of which he had notice, and defendants never refused to execute nor withheld the same from the plaintiff. *Held*, good.

MERRITT vs. NIAGARA DISTRICT MUTUAL FIRE INSURANCE Co.² (Queen's Bench, Upper Canada, Trinity Term, 1859.) *Other Insurance. — Waiver.*

To a declaration against a mutual insurance company on a policy of insurance against fire, defendants pleaded: 1. That before the granting of the policy sued on the plaintiff had insured with another company, to which the defendants never consented, nor was such consent indorsed on their policy. 2. That after the defendants' policy was granted the plaintiff effected an insurance with another company without defendants' consent, and without having such consent indorsed on their policy.

The plaintiff replied, on equitable grounds, to the first plea, that the insurance had been effected with the A. Co. which had failed, and the plaintiff notified defendants thereof,

¹ 18 Up. Can. Q. B. 438.

² 18 Up. Can. Q. B. 529.

Assignment. — Action. — Alienation. — Increase of Risk.

and that said policy would not be renewed, to which defendants made no objection, but afterwards granted the policy sued on, and received from the plaintiff the calls on his premium note. And to the second plea, that the plaintiff notified defendants' agent of the insurance there mentioned, so that he might indorse defendants' consent thereto on their policy, or notify the plaintiff if defendants refused to do so, but that they did neither, and afterwards made the plaintiff pay calls on his note. *Held*, on demurrer, replications bad, for the statute 6 W. 4, c. 18, § 22, avoids the policy under the facts pleaded, and the condition could not be waived by defendants' conduct.

PERKINS vs. EQUITABLE INSURANCE CO.¹ (Supreme Court, New Brunswick, Trinity Term, 1859.) *Proofs of Loss. — Certificate. — Evidence. — Mortgage.*

One of the conditions of a policy of insurance required that all persons sustaining loss should give notice to the agent through whom insured, and within one month after the loss deliver in as particular an account thereof as the nature of the case would admit, and, *if required*, make proof of the same by their oath or affirmation, and by the production of their books of account, &c., and should, *if required*, procure a certificate under the hands of three of the nearest householders, &c. The plaintiff having sustained a loss, furnished an affidavit and certificate in the terms of the condition, without being required to do so. In an action on the policy, one of the notices of defence was, that the proof and certificate required by the condition were not given by the plaintiff after the alleged loss; but the defence on the trial was, concealment at the time of effecting the policy. *Held*, 1. That the affidavit and certificate were admissible as part of the preliminary proof. 2. But if not strictly admissible, it was immaterial evidence, and therefore no ground for a new trial.

The plaintiff, in his application to insure a building, stated that it was owned by himself and P., and worked by them as a mill. At that time the mill was in possession of a tenant under a lease for five years, was mortgaged to its full value, and a line of railway had been laid out through the land, for which the plaintiff claimed damages, alleging that it destroyed the mill. There being nothing in the policy requiring such matters to be disclosed, it was left to the jury, and they found that the non-disclosure was not material. *Held*, that these questions were properly left.

A mortgagor may insure to the value of his property without disclosing the incumbrance, unless there is a stipulation in the policy requiring it.

The agent of an insurance company cannot be asked, in an action on the policy, whether he would have taken the risk if certain facts had been communicated to him.

JOHN & MALCOLM CAMPBELL vs. ÆTNA INSURANCE CO.² (Supreme Court, Nova Scotia, Trinity Term, 1859.) *Other Insurance.*

Where a second insurance has been effected without notice, contrary to the terms of the policy, *held*, that the plaintiffs cannot recover under the first policy.

SHEPHERD vs. UNION MUTUAL FIRE INSURANCE CO. NEW HAMPSHIRE SAVINGS BANK IN CONCORD vs. THE SAME.³ (Supreme Court, New Hampshire, July Term, 1859.) *Assignment. — Action. — Alienation. — Increase of Risk.*

Where a policy of insurance is assigned, the action must be brought in the name of the original assured, unless by the assignment and the assent of the company, agreeably to

¹ 4 Allen, New Bruns. 562.

² Cochran, 21.

³ 38 N. H. 232.

Assignment. — Alienation.

their charter and by-laws, the assignee becomes substituted as the member of the company.

Where a by-law provides that the policy shall become void if the premises are alienated by sale, mortgage, or otherwise, unless certain things are done, it was held that a mere mortgage was not an alienation, within the meaning of the by-law.

A provision that if the risk should be increased by the acts of others, notice should be given, and an additional premium secured, was held valid. It is a question for the jury whether a change increases the risk.

PATTEN vs. MERCHANTS' AND FARMERS' MUTUAL FIRE INSURANCE Co.¹ (Supreme Court, New Hampshire, July Term, 1859.)
Incumbrances. — Misrepresentation.

A representation made to a mutual fire insurance company by the applicant for insurance, in answer to a direct inquiry, that the property is not incumbered by mortgage or otherwise, is a material representation within the meaning of a by-law of the company, which declares that the policy shall be void if the application does not contain a full and true exposition of the facts and circumstances relative to the condition, situation, and risk of the property, so far as they are material to the risk, and within the meaning of a covenant inserted in the application that it contains such exposition; and, if the representation is false by reason of the existence of a mortgage for a substantial amount at the time of the application, and of the issuing of the policy, the representation avoids the policy.

LOUISA S. SHOTWELL, plaintiff and respondent, vs. JEFFERSON INSURANCE Co.² (Superior Court, New York City, July, 1859.)
Agreement to convey.

An agreement to convey is not a "transfer or termination of the interest of the assured," either by sale or otherwise; and this too though the payment is to be made in annual instalments, one of which has before loss been paid, and possession taken under the agreement. But in such case the insured cannot recover more than the amount of the unpaid instalments and interest. Nor does it matter that after loss the purchase money was paid in full by the conditional vendee and a deed of the premises executed to him.

But the conditional vendee, for whose benefit the insurance was to be made, now became entitled to the sums recovered, and became virtually an equitable assignee of the same. See *King v. State Ins. Co. ante*, vol. 3, p. 186, and note.

BILSON vs. MANUFACTURERS' INSURANCE Co.³ (Circuit Court, United States, July, 1859.) *Assignment. — Alienation.*

A mortgagor effects a policy of insurance against fire, which provides that the insurers' liability should cease upon assignment of the policy without their consent; and that it should become void in case of the termination of the interest of the insured in the subject of the insurance. Subsequently the mortgagor makes an assignment of *all his title and interest* in the policy to the mortgagee — in *visual juxtaposition* to the policy, though without the written consent of the insurers, and a renewal is effected and premium therefor paid by the mortgagee. Mortgagor then conveys the fee to the mortgagee. *Held*, that the court properly instructed the jury that if the existence of the assignment was known to the assurers, the act of renewal included the consent required by the policy. *Held*,

¹ 38 N. H. 338.

² 5 Bosw. 247.

³ 7 Am. Law Reg. 661.

Representations by Third Person. — Practice.

however, furthermore, that the assignment to the mortgagee only operated as an equitable transfer of the policy, and that the approval of the assignment by the insurers did not convert his contract into a new one for the independent insurance of the mortgagee.

The transfer of the property to the mortgagee, so as to divest the mortgagor's (the plaintiff's) interest, has the same effect as if the conveyance had been made to some third person other than the mortgagee, there being, in both cases, a change of interest in the subject of the insurance.

PENLEY vs. BEACON ASSURANCE Co.¹ (Chancery, Upper Canada, September, 1859.) *Limitation Clause. — Equity. — Verbal Contract.*

A party effected an insurance, through the agent of the defendants, by paying the premium required by the established rates of the company. The agent gave the usual receipt, and informed the head office of the insurance and payment, and was credited with the amount. A fire occurred shortly afterwards in the insurer's premises, and before the policy was issued. By a condition on the policies of the company, it was provided that "no suit or action against the company should be sustained in any court of law or chancery, unless commenced within six months after loss or damage." On a bill filed to recover the amount of insurance, or to compel the issue of a policy, it was *held*, that courts of equity have jurisdiction in policies of insurance.

Held, also, that there was a contract by the defendants to issue a policy to the plaintiff; that the agent was their agent to keep books, and by his entries there did so bind the defendants.

Held, further, that the limitation in the policy applies only to cases where the insured was in possession of a policy, and not to cases where the company has only issued a receipt.

As to verbal contracts for insurance, see *Jones v. Provincial Ins. Co.*, *ante*, and cases cited in note.

EDWARD DENNY vs. CONWAY STOCK AND MUTUAL FIRE INSURANCE Co.²

(Supreme Court, Massachusetts, September Term, 1859.)

Representations by Third Person. — Practice.

A policy of insurance was declared upon its face to be "made and accepted in reference to the survey on file at this office;" and was afterwards renewed "upon condition that the application, upon which said policy was originally predicated, shall continue valid and in full force." The policy had been issued upon an application for insurance headed with the name of another insurance company, and signed by the president of that company, who delivered the application to this company and procured the original policy and the renewal of it; but there was no other evidence that the application was made with the authority or knowledge of the assured. *Held*, that the assured was not bound by the statements in the application as to the precautions to be taken against fire; nor by representations made by such president, at the time of procuring the renewal, as to the amount of other insurance.

The breach of a warranty on the face of a policy of insurance, not alleged in the answer, nor relied upon at the trial, cannot be taken advantage of at the argument before the full court upon the report of the presiding judge.

¹ 5 Up. Can. L. J. 213.

² 13 Gray, 492.

ACTION OF CONTRACT upon a policy of insurance, numbered 1262, for \$5,000, upon the plaintiff's woollen mill in Barre, and the machinery and stock therein. Upon the face of the policy, immediately after the description of the property and the proportion of insurance upon each kind, were these words: "\$25,000 insured on same elsewhere in like proportions."

In the body of the policy it was "agreed and declared that this policy is made and accepted in reference to the survey on file at this office, and the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

The fourth of said conditions provides as follows: "Applications for insurance must specify the construction and materials of the buildings to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it; and, in case of goods or merchandise, whether or not they are of the description denominated hazardous, or extra hazardous, or included in the memorandum of special rates. And a false description by the insured, of a building or of its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, or, in a valued policy, an overvaluation of the same, shall render absolutely void a policy issuing upon such description or valuation. And if any survey, plan, or description of the property herein insured is referred to in this policy, such survey, plan, or description shall be deemed and taken to be a warranty on the part of the assured."

The original policy was for one year from the 1st of January, 1855, and was renewed yearly "upon condition that the application upon which said policy was originally predicated shall continue valid and in full force." The fire occurred in February, 1858.

Answer, that the policy "was made upon the representations contained in the application, a copy whereof is hereto annexed, and the renewal of said policy was made upon the said representations, and also upon the representations contained in the letter, a copy of which is hereto annexed; that these represen-

tations were made by the plaintiff and by his agent ; and that said representations were not true in this, to wit, that there were no ladders such as is described in said application, nor any other ladder affixed to said building equivalent to that described as aforesaid, and there was no watch kept in said building such as is described in said application, and thereby the said risk was greatly increased ; and they say there was no other insurance on said property, whereby the defendants were deceived and misled in respect to said risk."

The application annexed to the answer was in the usual form of an application for insurance, headed, "Manufacturers' Mutual Fire Insurance Company. The application of ——— for insurance;" containing, among other written answers to printed interrogatories, these: "There is one stationary ladder from the ground to the roof, and another soon to be erected." "A watch is kept constantly in the building;" and signed only thus: "I certify that the above is a correct survey of the mill as made by myself. Henry A. Denny, Prest. Nor. Manufacturers' Mutual Ins. Co."

The letter annexed to the answer was from said Denny, dated "Office of the Mechanics' Mutual Fire Insurance Company, Worcester, 24th December, 1855," and addressed to the defendant's secretary, saying: "Do you wish to renew policy No. 1262 on the woollen mill of E. Denny, of Barre, at same rate? I have recently examined the premises. We shall renew our policy at the same rate. Whole amount of insurance, \$30,000."

At the trial before Metcalf, J., the defendants offered evidence that Henry A. Denny applied to their secretary for the original insurance, and that they received from said Denny the application annexed to their answer, before the policy was made, and that the policy was predicated upon it; that the letter annexed to their answer was written by Henry A. Denny, on the 24th of December, 1855, and put on the files of the company with the survey, and the subsequent renewals were predicated upon the application and this letter; and that all the renewals were obtained by the plaintiffs through Henry A. Denny. But the defendants offered no evidence of any authority to him to act as the plaintiff's agent, except such as might be inferred from his own acts and his own statements to them.

They also offered evidence that there never was but one sta-

tionary ladder in the building (though there were other means of putting out fire, which the plaintiff contended were equivalent), and that for three or four months before the fire the mill had not been in operation evenings or Saturdays, and no watchman had been on the premises while it was not in operation; and that the other insurance on the property, at the date of the policy, was only \$12,000 (including \$5,000 in the Mechanics' Mutual Fire Insurance Company, which expired on the 8th of May, 1856), \$15,000 from the 1st of July, 1856, and less and less afterwards until the 1st of January, 1858, since which time there had been none but the policy in suit.

The defendants "contended that the policy was forfeited: 1st. By the neglect of the plaintiff to provide two stationary or permanent ladders. 2d. By his neglect to keep a watchman constantly in the mill. 3d. By the misrepresentations in regard to insurance in other offices, especially in regard to the insurance in the Mechanics' Mutual Fire Insurance Company, and the foregoing proof that there was no such insurance."

The judge ruled that the evidence offered would constitute no defence to the action; the jury rendered a verdict for the plaintiffs, and the case was reserved for the consideration of the full court.

BIGELOW, J. The defendants, at the trial of this case, rested their defence solely on these two grounds: 1st. That the plaintiff had failed to comply with certain executory representations and stipulations, concerning the construction and mode of use of the property insured, during the period of time covered by the policy; and 2d. That he had misstated the amount of insurance existing on the buildings at the time of making application to the defendants to insure them.

1. In support of the first ground of defence, and in order to prove the stipulations and representations which it was alleged the plaintiff had violated, the defendants offered in evidence a paper containing a description of the property insured, in the form of questions and answers, as usually made in applications for insurance. But this paper did not on its face purport to have been made by the plaintiff or in his behalf, nor was it signed by him. It was a description of the property by a third person; nor was there any evidence that its contents were assented to or even known by the plaintiff.

The defendants, however, sought to hold him responsible for the statements and stipulations contained in it, by reason of a clause in the policy to the effect that the contract of insurance was made and accepted in reference to a "survey" on file in the office of the defendants, which was to be resorted to in order to explain the rights and obligations of the parties under the contract. The argument was, and it is now again urged, that the plaintiff, having accepted a policy which referred to a survey, is shown to have had constructive notice of the existence of such survey; that he is bound by the stipulations and representations contained in it, and in seeking to enforce the contract is estopped to deny that they were made by him or by his authority.

Admitting the soundness and force of this argument, and that the plaintiff is bound by the survey so far as he has recognized and adopted it by accepting the policy, the question still remains to be determined, to what extent such recognition and adoption go. And the answer to this question depends on the proper and legitimate meaning of the word "survey;" because it was of this, and this only, that the plaintiff had notice by the terms of his policy. Upon this point we think there can be no doubt. In its strict signification, as well as in the broader meaning which it may be supposed to have as applied to the subject matter, it can be taken to import only a plan and description of the present existing state, condition, and mode of use of the property. It cannot, by any reasonable construction, be held to signify that any statements or representations of a promissory or executory nature were embraced within it, relating to any contemplated alteration or improvement in the property, or to the mode in which the premises were to be occupied during the continuance of the policy. In this sense, the word appears to be used in the conditions of insurance attached to the policy and forming a part of the contract. The terms "survey, plan, and description" are there used as being nearly synonymous.

Such being the true import of the word "survey," we can have no difficulty in ascertaining the extent to which the plaintiff is bound by the representations and stipulations contained in the paper which the defendants offered in evidence at the trial. So far as they are of an executory nature, or relate to the use or occupation of the premises subsequently to the date of the policy, it is clear that the plaintiff is not bound by them. He has

Alienation. — Burden of Proof

neither recognized nor adopted them, nor is he estopped from showing that they are not obligatory upon him. The defendants therefore cannot sustain their first ground of defence by proof that no watchman was constantly kept in the mill, or that ladders were not erected on the buildings. Those were stipulations by which he was not bound.

The condition in the certificates of renewal, "that the application upon which said policy was originally predicated shall continue valid and in full force," cannot enlarge the effect of the original reference in the policy.

2. As to the second ground of defence, based on the alleged misrepresentation concerning the amount of insurance on the property when the policy was issued, it is sufficient to say that there was no evidence at the trial that any representations on the subject were ever made or authorized by the plaintiff.

3. It was suggested at the argument of the case on the questions raised at the trial and presented by the report of the judge, that the facts in evidence disclosed an additional ground of defence. The policy on its face contains the express stipulation or warranty that twenty-five thousand dollars were insured on the property elsewhere; and it appeared at the trial that the amount actually insured was much less than this sum. It is quite probable that this would have been a sufficient answer to the plaintiff's claim if it had been seasonably insisted on. But we think it is quite too late for the defendants now to avail themselves of it. No such ground of defence was distinctly stated in their answer, nor was it suggested at the trial. They cannot be permitted, in this stage of a cause, to start a new objection to the plaintiff's right to recover, which was within their knowledge at the time of the trial, and of which they did not seek to avail themselves, when the plaintiff had an opportunity to meet it.

Judgment on the verdict.

ELIZA A. ORRELL vs. HAMPDEN FIRE INSURANCE CO.¹ (Supreme Court, Massachusetts, September Term, 1859.) *Alienation.*
— *Burden of Proof.*

In an action upon a policy of insurance upon property which is admitted to have been owned by the plaintiff when the policy was issued, the burden of proof is upon the defendants to show a subsequent alienation of the property. A mere agreement between

¹ 13 Gray, 431.

 Insurable Interest. — Assignment. — Practice. — Overvaluation.

the owner of the property insured and another person, to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person, does not avoid the policy, although the policy is upon condition that the insurance shall be void "in case of any sale, transfer, or change of title."

CHASE vs. HAMILTON INSURANCE CO.¹ (Court of Appeals, New York, September, 1859.) *What Policy covers. — Stone Dwelling-house. — Knowledge of Agent.*

The application in this case was for insurance upon a stone dwelling-house. By the proof it appeared that the building was a stone building with a wooden kitchen, twelve by fourteen feet, one story high, attached. *Held*, a misrepresentation which avoided the policy. The application implied that the policy was to cover an entire dwelling-house. The proposition that where a dwelling-house consists of a building, a part of which is stone and a part wood, the owner may procure a policy of insurance upon his stone dwelling-house, and that it shall cover only the part constructed of stone is not sound. A dwelling-house is an entire thing. It includes the building and such attachments as are usually occupied and used by the family for the ordinary purposes of a house. A kitchen constructed like the one in this case clearly constitutes part of the dwelling-house. A policy of insurance upon a dwelling-house, when that is the only description of the subject of insurance, must attach to the whole, or it will not to any portion of it. Per GROVER, J. Nor was the case altered by the knowledge of the agent of the existence of the wooden kitchen; the application having stated that the defendants should not be bound by any act done or statement made to or by any agent or other person which was not contained therein.

MATHEWSON vs. WESTERN ASSURANCE CO.² (Superior Court, Montreal, October, 1859.) *Insurance of Mortgage Interest.*

The insurance by a mortgagee creditor of the house or building subject to his mortgage is not an insurance of the building *per se*, but only of the creditor's security for the payment of his debt.

To support an action on the policy, there must be a loss existing at the time of action brought.

If, before action brought, the premises be rebuilt whereby the creditor's security is restored, he cannot recover as for a loss.

PARK vs. PHOENIX INSURANCE CO.³ (Queen's Bench, Upper Canada, Michaelmas Term, 1859.) *Insurable Interest. — Assignment. — Practice. — Overvaluation.*

The plaintiff, in an action on a policy of insurance, averred that at the time of effecting the policy he was interested in the property insured; that his interest was before the loss assigned to one B. which assignment was accepted by defendants; and that until the loss B. continued interested, and the plaintiff as trustee for him.

Defendants did not demur, but pleaded: 1. That at the time of the loss the plaintiff had no interest; and 2. That before the fire he assigned the policy to B. without having the transfer indorsed, and without defendants' consent.

It appeared that the statement in the declaration was true, that is, that the plaintiff had assigned his interest to B. which assignment was approved by defendants. *Held*, that the plaintiff was entitled to succeed on the issue.

The third plea alleged that the plaintiff had effected another insurance in the A. Co. with-

¹ 20 N. Y. 52.² 4 L. Can. Jur. 57.³ 19 Up. Can. Q. B. 110.

Alienation. — Assignment in Insolvency.

out notice to defendants or indorsement on their policy. The evidence showed that this policy was effected by one S. (whose interest in the property did not appear), in his own name, and assigned by him to B. *Held*, that the plea was not proved, for the insurance complained of was not shown to be by or for the plaintiff, or of his interest, which would be necessary to avoid the plaintiff's policy.

In the sixth plea defendants set up as a defence that after the fire the plaintiff, in making his claim, had misrepresented and overstated the amount of his loss, contrary to the form and effect of the condition in the policy. *Held*, that to sustain this plea it was necessary to prove that the overestimate did not arise from mistake or inadvertence, but was made designedly, for the purpose of obtaining a larger sum than the loss really sustained, or to prevent close inquiry. *Held*, that upon the evidence in the case — it being probable that the loss, though overestimated, was equal to the sum insured, and there being circumstances which might explain the overcharge — that the jury were warranted in finding for the plaintiff.

JOHN PLATT vs. GORE DISTRICT MUTUAL FIRE INSURANCE Co.¹ (Common Pleas, Upper Canada, Michaelmas Term, 1859.)
Conditions of Policy. — Proof of.

On an action brought upon a policy of insurance, the defendants pleaded the non-fulfilment of the twelfth condition of the policy, which required the certificate of the nearest magistrate of the cause of the fire, upon which the plaintiffs took issue. *Held*, that the proof of the plea rested upon the defendants, and the plaintiff having given *prima facie* proof of the fulfilment of the condition, was entitled to the verdict.

WELCOME YOUNG & another vs. EAGLE FIRE INSURANCE CO.²
(Supreme Court, Massachusetts, November, 1859.)

Alienation. — Assignment in Insolvency.

An assignment under proceedings in insolvency, commenced by the debtor, is an alienation of his property, within the meaning of a stipulation in a mutual insurance policy, that "when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void;" and defeats the right of a mortgagee to recover a portion stipulated by the policy to be paid to him in case of loss.

ACTION OF CONTRACT by the assignees in insolvency of Francis Worcester on a policy of insurance for \$2,000, made to him by a mutual insurance company, "under the conditions and limitations expressed in the by-laws" annexed to the policy, on a building owned and occupied by the plaintiff, "\$1,500 payable, in case of loss, to Charles Marston," who held a mortgage of that amount on the building.

The twelfth article of the by-laws provided that "when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void; but, on application, the policy may be revived with the consent of

¹ 9 Up. Can. C. P. 405.² 14 Gray, 150.

the president expressed in writing ; and in all cases of transfer of policies the alienee shall give a new deposit note if requested."

The parties agreed that Worcester, after the making of the policy, applied for the benefit of the insolvent laws to a judge of insolvency, who had and took jurisdiction of his application, and who, on the 1st of June, 1857, duly assigned all his property, including the building insured, to these plaintiffs ; and that " there was no notice to the defendants of said assignment, or consent of the defendants asked for or given to the same ; but the defendants knew of the fact of the assignment and insolvency before the action was commenced." During the continuance of the policy, on the 12th of November, 1857, the building was totally consumed by fire, and due notice and proof thereof given to the defendants.

The question whether these facts showed such an alienation of the property as avoided the policy was submitted to the decision of the court, with an agreement that the whole amount of the insurance might be recovered in this action if the defendants were liable therefor in any action by the assignees, the mortgagee, or the insolvent.

DEWEX, J. By the twelfth article of the by-laws of this insurance company it is provided that " when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void." The question is, whether the present case falls within that provision. It appears that the assured, upon his voluntary application to the judge of insolvency, procured the institution of proceedings against his estate, and that the judge, by a deed of assignment in the usual form, on the 1st of June, 1857, assigned all the property of the insolvent, including the property insured, to assignees. This was more than five months before the loss by fire occurred.

The question is not merely whether there was an insurable interest ; nor whether in the ordinary case of insurance in a stock company, upon the principles of the common law, this policy would become void by reason of such transfer to an assignee. The rights of the plaintiffs are to be settled by reference to this policy, made by a company acting as a mutual insurance company, and accepted " under the conditions and limitations expressed in said by-laws," as is declared on the face of it.

Looking at the case in this aspect, we find, in the first place, the terms of the by-law as to an alienation to be very general, — if

the property "shall in any way be alienated." That this property was in fact alienated, must be admitted. Such a deed to assignees, by the terms of the statute, "shall vest in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned, or conveyed." St. 1838, c. 163, § 3. The legal estate is as effectually passed from the debtor, as if he had conveyed the same by a deed of warranty to any third person.

The only ground for maintaining any distinction is, that this was a sequestration of the property for the benefit of creditors under the provisions of the statute. As respects this policy, the difference is immaterial. The legal interest is gone; the right of possession is gone. Neither those who hold the estate, nor those for whom it is held, are members of the company, or liable to be assessed for future losses that may occur on other policies. The by-laws require that the policy be revived with the consent of the president expressed in writing; and that in all cases of transfer of policies the alienee shall give a new deposit note if requested.

In reference to policies issued by mutual insurance companies, it has been often said that they might reasonably be supposed to take into consideration the character of the insured. That this company deemed it important to provide for a less change in the state of the property than an extinguishment of all interest in the party insured is quite obvious from the provision of this by-law, that "when any property insured by this company shall be taken possession of by a mortgagee, the policy shall be void." The change effected by the assignment of the judge in insolvency is much greater than such a change of possession, which, as we see, was made by the by-laws a cause of avoiding the policy. All the evils which would result from an entry by a mortgagee to foreclose exist in this case. The possible interest in the estate, on the part of the insolvent debtor, is far less than that of a mortgagee after entry for foreclosure. Confining the decision to the case here presented, the court are of opinion that this policy was rendered void by the proceedings in insolvency, and transfer of the property to an assignee.

A similar view of the effect of proceedings in bankruptcy, under the U. S. St. of 1841, Sess. 1, c. 9, § 3, was taken by the supreme court of Maine in the case of *Adams v. Rockingham Mutual Fire Ins. Co.* 29 Maine, 292.¹

¹ *Ante*, vol. 3, p. 30.

Evidence of Waiver.

The provision that fifteen hundred dollars, the amount insured should be "payable, in case of loss, to Charles Marston," who was a mortgagee of the premises, does not change the result. The policy was not on his interest as mortgagee, but a policy in favor of the mortgagor and on his interest; and any forfeiture, by reason of a breach of the by-laws, that would defeat the policy as respects Worcester, the party for whom the policy was made, is equally fatal to Marston, whose rights merely attach to a legal claim for a loss arising upon the interest of Worcester. *Loring v. Manufacturers' Ins. Co.* 8 Gray, 28.

Judgment for the defendants.

GARDNER BREWER vs. CHELSEA MUTUAL FIRE INSURANCE Co.¹

(Supreme Court, Massachusetts, November Term, 1859.)

Evidence of Waiver.

It is no evidence of waiver of a by-law of a mutual fire insurance company, requiring the assured, before the delivery of any policy, to pay such premium and give such deposit note as the president and directors shall from time to time determine, that the policy was made out and recorded in the company's books, pursuant to an agreement between the person to be insured and the president of the company; that the directors had previously voted "that the premiums on all policies shall be payable within thirty days from the date of said policies, and if not paid within sixty days the policy shall be considered cancelled;" that, both before and after sixty days from the date of this policy, the president and secretary requested this person to pay the premium, without suggesting any invalidity of the policy; and that, after a loss of the property insured, an assessment was laid to cover it.

ACTION OF CONTRACT upon a policy of insurance, dated the 1st of March, 1857, made by the defendants to George W. Gerrish, for four years, upon a house in Cedar Street, in Chelsea, "under the conditions and limitations expressed in" the by-laws annexed to the policy, and "payable, in case of loss, to Gardner Brewer," mortgagee.

Two of those by-laws were as follows: "Art. 20. Each person or company, by its agent, upon the execution of his, her, or their policy or policies, and before the same shall be delivered, shall pay such premium, and give such note for deposit, as the president and directors shall from time to time determine." "Art. 22. These regulations may be altered at any annual meeting, or at any legal meeting of the company, called for that purpose, by the majority of the members present."

¹ 14 Gray, 203.

Evidence of Waiver.

At the trial in the superior court of Suffolk, at May term, 1858, before Morton, J., it appeared that on the 11th of December, 1854, the defendants' board of directors, Gerrish being a member and present, " Voted, that the premiums on all policies shall be payable within thirty days from the date of said policies, and if not paid within sixty days, the policies shall be considered cancelled."

The following facts were admitted : Gerrish had formerly procured from the defendants several policies of insurance upon this building and other estates in Cedar Street, in Chelsea, of which he owned the equity of redemption, payable in case of loss to the mortgagees, which expired on the 1st of March, 1857. A few days before that day the defendants' president informed Gerrish that the policies were about to expire, and asked him if he wanted them renewed ; and it was then orally agreed between them, that the policies should be renewed for the same amounts, for the term of four years from the 1st of March, 1857, and payable, as before, to the mortgagees. Pursuant to this agreement, policies were written and signed by the president and secretary of the defendants, in the usual form, all dated March 1, 1857, and recorded in the defendants' books.

There was evidence tending to show that it was likewise orally agreed at this time, between Gerrish and the president, that the latter should take the policies, when made out, to Gerrish's office in Boston ; and that he did take over some of the policies, for which Gerrish paid the premiums and signed the deposit notes ; that Gerrish did not examine them, but requested the president, who occupied an adjoining office, to deliver them to the mortgagees, which the president did ; and that Gerrish supposed all the policies were brought over.

The defendants' president testified that, upon agreeing to insure, he generally entered the agreement in his memorandum book, and that he then considered the property insured.

It appeared that the policy now in suit and two others made at the same time were never delivered, and that the premiums and deposit notes therefor were never paid or given, but that the policies were executed and ready for delivery ; and that on the 9th of June, 1857, the buildings described in these three policies were destroyed by fire.

There was evidence tending to show that Gerrish was requested

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by the president and secretary, both before and after the 1st of May, 1857, to pay for these three policies, and replied that he would do so soon ; but that neither the president nor secretary ever told Gerrish that the policies would be cancelled if he did not pay, or even told him that he was not insured. There was evidence that the plaintiff's agent called on the president and secretary after the fire, in regard to the insurance, and was told by the secretary that he must see the directors before delivering the policies, and by the president that the premium could be taken out of the loss, but that he wished to see the directors before paying ; and that on the 25th of June, Gerrish called on the secretary and asked for the three policies and tendered the premiums and deposit notes therefor, and that the secretary was in the act of delivering them, when one of the directors told him he had better not do so.

It was admitted that on the 11th of August, 1857, an assessment was laid by the defendants for the loss under the three undelivered policies, of which Gerrish, who was largely insured by the company on other risks, paid his proportion.

The defendants requested the presiding judge to rule and instruct the jury, that " the by-laws of the company were obligatory and binding, both upon its officers and upon all persons who became members of the company ; that the officers of the company could not abrogate the by-laws, or waive the provisions thereof, so as to make a contract of insurance, which should conflict therewith ; and that, as the twentieth article of the by-laws of the company required that the premium should be paid and the deposit note given before any policy should be delivered, and as no premium had been paid or deposit note given, and no delivery of the policy made, this action could not be maintained."

But the judge refused so to rule and instruct the jury ; but did rule and instruct them " that, in order to entitle himself to a verdict, the burden of proof was upon the plaintiff to show that the defendant company, for a valuable consideration, made a contract with Gerrish to insure fifteen hundred dollars on the house in question, payable, in case of loss, to the plaintiff, and that a memorandum in writing thereof was made and signed by the defendant company or its authorized agents ; that such contract, to be valid, must be upon a valuable consideration ; and that a valid, absolute, and unconditional promise by Gerrish, to pay the pre-

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mium and sign the policy note, would be a sufficient consideration ; that such contract must be unconditional ; and that if the twentieth by-law and the vote of December 11, 1854, were known to Gerrish, they would affect and control the contract, making it a conditional contract ; and as the conditions thus imposed had not been complied with, the plaintiff could not recover, unless the jury were satisfied that a compliance with their provisions had been waived by the defendant company, and that it was not the intention of the parties that such provisions should affect and become a part of their contract ;" " that, as the said by-law and vote were passed for the benefit and protection of the company, the company could waive them ; and that it was not necessary that the waiver should be by a formal vote of the company ; but that a waiver by the officers and agents charged with the direction and control of the affairs of the company would be binding upon the company ; and if the jury were satisfied, either by a direct vote or a verbal agreement, or the acts and course of dealing of such officers, indicating such intent, that such officers intended to and did waive said by-law and vote, and that the said officers and Gerrish did not mean to have the by-law and vote apply to their contract, it would not apply ; and " that, if the jury were satisfied, upon all the evidence, that the defendant corporation made and executed a policy of insurance, such as is declared on, and that it was the intention of the said officers and of Gerrish that the policy should attach and become an existing, operative, unconditional contract of insurance, and that the company did waive the said by-law and vote, by their officers as aforesaid, and said contract continued in full force to the time of the fire, the plaintiff might maintain this action on the policy itself, though there had been no actual delivery of it." The jury thereupon found a verdict for the plaintiff, and the defendants alleged exceptions.

BIGELOW, J. By the twentieth article of the by-laws of the corporation, by which the rights of the parties under the contract are regulated, it is provided that, before the policy shall be delivered, the assured shall pay such premium and give such deposit note as the president and directors shall determine. The effect of this stipulation was, that the contract of insurance should not be completed nor the policy take effect until such premium was paid and such note given. It is admitted in the present case that the assured had not complied with this by-law.

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The plaintiff, however, seeks to avoid the effect of such non-compliance, and to maintain the policy as a valid contract, on the ground that this stipulation in the by-laws for the payment of the premium had been waived by the officers of the company. On looking into the evidence, which is fully reported in the exceptions, it does not appear that there was any proof of waiver by the corporation. The case therefore comes directly within the recent decision of this court in *Hale v. Mechanics' Mutual Fire Ins. Co.* 6 Gray, 169.¹ The president, secretary, and board of directors were all special agents, with limited powers, and had no authority to dispense with the by-laws. These could be changed only in pursuance of the twenty-second article, at an annual meeting, or at a legal meeting of the company called for the purpose, by a vote of a majority of the members present.

The decisions cited by the plaintiff's counsel, in which the doctrine of waiver has been applied to contracts of insurance, — and it has been held that the officers or agents of corporations might alter or dispense with the stipulations contained in the contract, — are cases where the policies have been issued by companies organized with a capital stock, divided into shares and represented by a general agent or officer. But such decisions do not apply in a case like the present, where the policy is issued by a company established on the mutual principle, in which the by-laws are made to fix and regulate, by the same stipulations in every policy, the rights of all the assured alike, and the assured are themselves members of the company, and as such have notice of every provision contained in their by-laws.

There is also a class of cases in which it has been held that companies established on the mutual principle may be bound by the acts of their officers in waiving the formalities of preliminary proof of loss as required by the by-laws. But those cases are distinguishable from the present. Such stipulations do not touch the substance or essence of the contract, or affect its validity, but relate only to the form or mode in which the liability of the company shall be ascertained and proved. Besides, such preliminary proof must be necessarily submitted to the officers of the corporation, who must pass on its sufficiency, and it therefore comes within the scope of their authority to say whether proof of the loss is sufficient.

Exceptions sustained.

¹ *Ante*, p. 59.

Failure to pay Assessment.

BRANNIN & BAILEY vs. MERCER COUNTY MUTUAL FIRE
INSURANCE Co.¹

(Supreme Court, New Jersey, November Term, 1859.)

Failure to pay Assessment.

The condition in an insurance policy issued to C. & Co., was as follows: "Any member of this company who shall have been assessed for the payment of any loss or damage by fire, neglecting or refusing to pay such assessment for thirty days after he or she shall have had notice of the same, shall forfeit his or her policy, provided the premium note or notes deposited with the company, after paying any losses or expenses which may have accrued thereon, shall be given up to him or her on demand;" the policy was assigned January 13, 1855, the transfer approved by the company March 5, 1855, and the premium note of C. & Co. given up, and a new note taken from the assignees. An assessment had been made on the note of C. & Co., October 3, 1854, notice of which assessment was given to them and the plaintiffs, May 17, 1855; the assessment was not paid; in an action on the policy brought by the assignees to recover for a loss by fire, *held*, that the validity of the policy was not affected by non-payment of the assessment against C. & Co.; they not being members of the company when notice of the assessment was given to them.

ON motion for new trial.

Argued before the Chief Justice and Justices Van Dyke, Vredenburgh, and Whelpley.

The opinion of the court was delivered by the

CHIEF JUSTICE. To an action of covenant on a policy of insurance against loss by fire, the defendants plead, by way of defence, that the policy is forfeited by a refusal on the part of the holder to pay an assessment made, according to the rules of the company, for the payment of loss or damage by fire. Upon the trial, the jury were instructed that the defence was not sustained, and this instruction by the court constitutes the sole ground of the application for a new trial.

The policy is dated on the first of February, 1848, and continues for ten years. It was originally issued to Curtis & Co., by whom the original premium note was given. It passed by assignment to the plaintiffs, the grantees of the premises insured, on the thirteenth day of January, 1855. This transfer to the plaintiffs was approved by the company on the fifth of March, 1855, at which time the original premium note given by Curtis & Co. was given up, and a new premium note taken from the plaintiffs. The plaintiffs' note is dated on the fifteenth of January, 1855, the day of the transfer of the policy.

On the third of October, 1854, ten per cent. was assessed

¹ 4 Dutcher, 92.

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against Curtis & Co. upon their premium note. On the seventeenth of May, 1855, notice of this assessment was given to Curtis & Co. and to the plaintiffs. The assessment was not paid. The insured premises were destroyed by fire on the fourth of January, 1856. The tenth article of the "deed of settlement," or conditions annexed to the policy, under which it is insisted that the policy is forfeited, is as follows: "Any member of this company, who shall have been assessed for the payment of any loss or damage by fire, neglecting or refusing to pay such assessment for thirty days after he or she shall have had notice of the same, shall forfeit his or her policy, provided the premium note or notes deposited with the company, after paying any losses or expenses which may have accrued thereon, shall be given up to him or her on demand."

It is clear that the case proved is not within the letter of the contract. It is only a *member* of the company who shall have been assessed for the payment of any loss that can incur the forfeiture by non-payment of the assessment. At the time of this assessment the plaintiffs were not members of the company. The assessment was not made against them nor upon their note. The fire had occurred, and the assessment had been made before they became members. The assessment for the loss was properly made against Curtis & Co. upon their note. The assignment of the policy of insurance by them to Remsen & Co., as mortgagees of the insured premises, did not affect their rights or liabilities as members. They still retained an insurable interest in the premises which remained insured, and by the terms of the charter their membership continued. Charter, § 2; Parsons on Mer. Law, 532.

But they were not members when the notice to pay the assessment was given, nor when the neglect or refusal to pay the assessment occurred. After they ceased to be members, no act or default of theirs could affect the rights of the plaintiffs. *Foster v. Eq. Mutual F. Ins. Co.* 2 Gray, 219;¹ *Tillou v. Kingston Mutual Ins. Co.* 1 Selden, 406.²

There is, then, by the terms of the condition, no forfeiture incurred. There is no violation of the letter of the contract, nor is the forfeiture within the spirit of the contract. It could not have been within the contemplation of the contracting parties. The design of the tenth article was to insure, under pain of for-

¹ *Ante*, vol. 3, p. 741.² *Ib.* p. 238.

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feiture, prompt payment by the members of the company of all assessments for losses incurred, an object of primary importance in the successful operation of a mutual company. The party insured deposits his premium note, upon which he is liable to be assessed and to be sued upon failure to pay any assessment. He is liable, moreover, while he remains a member, by a neglect or refusal for thirty days after notice to pay an assessment, to forfeit his policy. This forfeiture can have no application to a person who has ceased to be a member. He has no policy to forfeit. He is still liable upon his note for all losses incurred while he remained a member. By the conditions of the policy, article 2, he cannot reclaim his deposit note without a proportionate deduction for all losses and expenses accrued previous to demanding the same. The error of the company consisted in surrendering the note of Curtis & Co. before the losses incurred while they were members had been paid.

Upon what principle was this loss to be assessed upon the note of the plaintiffs? It occurred before they became members. It could not, by the rules of the company, be assessed against them. They could not be sued for it, nor compelled to pay it. And surely it could not have been within the contemplation of the contracting parties that the insurer should forfeit his policy by the non-payment of an assessment for which he was not liable, nor for the default of a third party for whom he was not responsible, and over whose conduct he had no right of control. Had the note of the party originally insured been suffered to remain, and the company have accepted that note as proper security upon the transfer, as in the case of *Durar v. Insurance Co.* 4 Zab. 171,¹ a different question would have been presented.

By the seventh section of the company's charter (Pamph. Laws 1843, p. 159), the grantee or alienee of premises insured, having the policy assigned, may have the same ratified and confirmed to him for his own use and benefit; and by such ratification and confirmation such grantee or alienee shall be entitled to all the rights and privileges, and be subject to all the liabilities, to which the original party to whom the policy was issued was entitled and subjected. But this cannot mean that the grantee should be subject to the penalties or forfeitures incurred by the default or omission of his assignor. It must mean simply

¹ *Ante*, vol. 3, p. 607.

Amount of Recovery. — Two thirds Clause.

that his privileges and liabilities as a member of the company should be the same as if he had been an original insurer, and not an assignee of the policy. The forfeiture of the policy must have been incurred, if at all, under the provisions of the tenth article of the deed of settlement. But the plaintiffs are neither within the letter or the spirit of that article. To incur such a forfeiture the refusal to pay must be by a member of the company who is legally liable for the assessment.

There was no error in the instruction given to the jury, and the motion for a new trial must be denied.

BALTIMORE FIRE INSURANCE Co. vs. WM. MCGOWAN & JOHN MCGOWAN.¹ (Court of Appeals, Maryland, December Term, 1859.)
Renewal Receipt. — Evidence.

An insurance policy, under seal, was issued to "J. McGowan & Sons," for one year, with a covenant that it should continue so long as the "assured or their assigns" shall pay the premium, and the company shall accept and receive the same from them. At the time the policy was issued, the firm of "J. McGowan & Sons" was composed of the plaintiffs and another party, who retired from the firm during the first year, and the business was conducted by the plaintiffs under the same name. The day preceding the expiration of the policy, the premium for the second year was paid, and a renewal receipt indorsed upon the policy, stating that the company had received the premium from "J. McGowan & Sons" under the policy "*which is hereby continued in force*" for another year. A loss occurred, during the second year, and upon an action by the plaintiffs to recover therefor: *Held*, 1st. That the renewal receipt is not a parol and new contract with other parties, on which an action of assumpsit may be brought, but is simply an extension, for another year, of the original sealed contract, and the plaintiffs, not being the covenantees nor their assignees, cannot maintain an action of covenant upon the policy. 2d. But, whether specialty or parol, no action can be maintained on the contract, except by the parties insured; it is a joint contract, and whatever sum could be recovered would be *in solido*, and no one of the parties insured can sue alone for his proportion; these plaintiffs, therefore, cannot maintain the action.

An amendment of the writ and nar., so as to change them from covenant to assumpsit, may, under the Act of 1852, ch. 177, be allowed to be made at the trial.

ASHLAND MUTUAL FIRE INSURANCE Co. vs. HOUSINGER & NORTON.²

(Supreme Court, Ohio, December Term, 1859.)

Amount of Recovery. — Two thirds Clause.

In an action upon a policy of insurance in which the insurers promise to pay the insured all losses or damage . . . not exceeding \$2,500, that may happen by fire to their stock of goods; and providing also that the losses or damages be estimated at the actual value of the property at the time the same shall happen, and be paid at the rate of two thirds its actual cash value: *Held*, that the losses or damage being found to be the

¹ 16 Md. 47.

² 10 Ohio St. 10.

Amount of Recovery. — Two thirds Clause.

amount of \$2,500, and that such sum was less than two thirds of value of the stock of goods, the insured are entitled to recover the full amount of \$2,500, although that sum is the full amount of the insurance.

ERROR to the district court of Erie County. The original action was brought by the defendants in error against the plaintiff in error upon a policy of insurance upon a stock of goods, insured for twenty-five hundred dollars, and destroyed by fire. The case turns upon the construction of the following provision in the policy : —

“ And we do therefore promise according to the provisions of said act, to settle and pay unto the said assured, their heirs, executors, or assigns, all losses or damage, not exceeding in the whole the said sum aforesaid, which shall or may happen to the aforesaid property by, or by reason, or by means of fire, during the time this policy shall remain in force. That the said losses or damage be estimated according to the true and actual value of the property at the time the same shall happen, and be paid within ninety days after notice and proof thereof is made by the assured, *at the rate of two thirds its actual cash value*, and in conformity to the conditions annexed to this policy, and the provisions of the act of incorporation of said Ashland Mutual Fire Insurance Company.”

Upon the trial in the district court, the insurance company, by its attorney, asked the court to charge the jury, among other things, that the company under said policy could, in no event, be made liable but for two thirds of the actual value of the goods destroyed at the time of the fire. That as plaintiffs had another policy to the amount of twenty-five hundred dollars issued by another company on said goods, one half of the entire loss should be found by the jury, and the Ashland Company could be legally charged with only two thirds of such one half and interest.

The court refused thus to charge, but on the contrary did charge the jury, that if they found the plaintiffs entitled to recover at all, they were entitled to recover one half of the full value of the goods destroyed, with interest, as prescribed in the policy, if the entire loss should not exceed two thirds of the whole stock of goods which the plaintiffs had on hand at the time of the fire, covered by the policy. But that, if the loss amounted to more than two thirds of such stock, and should still be within

Amount of Recovery. — Two thirds Clause.

the limits of the amount or sum insured, then the recovery could not extend beyond one half of such two thirds, with interest from the time it should have been paid by the terms of the policy.

To which refusal to charge and to the charge given, counsel for the insurance company excepted.

The jury returned a verdict against the company for \$2,413.32, and judgment was entered accordingly.

To reverse this judgment the present petition in error was filed, and the error assigned is that the court refused to charge as requested, but did charge as stated.

SUTLIFF, J. We are unable to perceive any error in the refusal of the district court to instruct the jury as requested, or in the instruction given by that court to the jury. On the contrary, we regard the instruction given the jury as in accordance with the express provision and most obvious meaning of the contract.

The language of the contract expresses an undertaking on the part of the company "to pay all losses or damages, not exceeding said sum" (of \$2,500), "which shall or may happen to the aforesaid property (the stock of goods) . . . by means of fire during the time this policy shall remain in force." "That the said losses or damage be estimated according to the true and actual value of the property at the time the same shall happen, and be paid . . . at the rate of two thirds *its actual value*," &c.

Now here are two distinct sentences in the policy. The first expresses a promise "to pay *all losses or damages* not exceeding said sum" of \$2,500. The next sentence expresses a provision, "That the said losses or damages be estimated according to the true and actual value of the property;" and that the damages "be paid within ninety days," . . . "at the rate of two thirds *its actual cash value*."

In the first sentence or provision the company undertakes unconditionally to pay all losses or damages not exceeding the sum insured; and the only way of avoiding its obligation is to show that the promise thus clearly and unconditionally expressed is retracted or varied in the succeeding sentence. But it is a rule to so construe an instrument, if practicable, that the whole may stand: *Ut res magis valeat quam pereat*.

Nothing but a clear and unambiguous expression in the latter

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sentence, amounting to a necessity for it, could justify our regarding the subsequent provision in a contract as utterly inconsistent with the preceding provision.

But the instruction which the counsel of plaintiff in error asked the court to give the jury would have been not only to affirm the two provisions to be irreconcilable, but also to instruct the jury to disregard the clear and positive expression of the former provision.

The two provisions are not, in fact, inconsistent, as will be seen even by an adherence to a strictly grammatical construction of the sentences. It is "all *losses* or *damages*" which the company in the former provision undertake to pay; words of the plural number, and to which the words "*its* actual value" have no grammatical relation. If, therefore, we adhere to the strict rule of the structure of the sentence as expressed, we shall be constrained to regard the expression "its actual value" as meaning the value of the *stock of goods*. And such was evidently the true meaning of the words, as understood by the contracting parties. At least such is the more obvious meaning, we think, of the words used. And, certainly, such a construction preserves the positive preceding provision unimpaired, and at the same time gives the most sensible and consistent meaning and effect to the latter provision.

Under this construction of the contract, the undertaking of the company was clear and unambiguous. The undertaking was to pay all losses by fire, sustained by the insured within said sum of \$2,500, and not exceeding *two thirds* the *value* of the entire stock of goods so insured. If, then, the stock of goods were only of the value of \$3,000, and was destroyed by fire, the insured would only be entitled to *two thirds* its cash value, although the amount of the policy was \$2,500. But if the value of the stock of goods were \$10,000, in that case, whether the losses by fire amounted to only \$2,500 or to a total loss, the insured would be entitled to receive "all losses or damages not exceeding said sum" of \$2,500 — it being within the "rate of two thirds" of the risk of the entire stock of goods, which the company assumed.

This construction gives a sensible meaning to the contract. The object of the provision is thus secured to the company, and that, too, without materially impairing the benefit of the policy to the insured. By this construction, the insured is always in-

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terested to prevent the destruction of the property; and this object was doubtless all that was contemplated by the provision.

The district court gave substantially the same construction to the policy of insurance which we have expressed. We perceive no error in the record.

The judgment of the district court must therefore be affirmed, with costs.

BRINKERHOFF, C. J., and SCOTT, PECK, and GHOLSON, JJ., concurred.

MOUNT VERNON MANUFACTURING CO. *vs.* SUMMIT COUNTY
MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Ohio, December Term, 1859.)

Alienation.

A total alienation of property insured operates to avoid the policy of insurance, from the time of such alienation.

Where personal property insured against loss by fire in a mutual fire insurance company is sold by a master in chancery, in pursuance of a decree upon a mortgage given by the assured, and the proceeds of such sale are, by order of the court, applied to the satisfaction, *pro tanto*, of such decree, and the property insured is afterward burned, the assured cannot recover for the loss, although subsequently to such loss and before the commencement of the action on the policy, the sale was, by consent of all parties thereto, set aside by order of the court under whose decree the sale was made.

THIS action is brought upon a policy of insurance issued by the defendant on the 10th of January, 1850, insuring the plaintiff in the sum of five thousand dollars, against loss or damage by fire, on the fixed and movable machinery of the plaintiff, then situate in her woollen mill in the town of Mount Vernon, Knox County, Ohio, for the period of six years.

The matter set up in defence to the action is, that, at the time of the destruction of the property insured, the plaintiff had alienated the same.

In the court of common pleas, a judgment was rendered *pro forma*, from which an appeal was taken to the district court. In the latter court an agreed case was made between the parties, on consideration whereof the case was reserved to this court for decision.

The facts, as they appear in the agreed statement, are substantially as follows: —

¹ 10 Ohio St. 347.

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In January, 1850, plaintiff, a body corporate, was the owner of a certain property in Mount Vernon, which, to a due comprehension of the question now made, may be divided into three distinct parcels.

1. Village lots 143 and 144, on which it had erected a large woollen mill. This mill then contained certain machinery used for the manufacture of woollen goods.

2. The easement of a certain water power, then appurtenant to the last named premises, and used to propel the machinery contained in the mill.

3. Sundry other lots of land in the town of Mount Vernon, not in any way necessary to the enjoyment of the mill premises, or connected therewith.

These three parcels were then incumbered in the manner following: —

1. The water power, and the last named lands, together with other real estate not owned by plaintiff, was subject to a mortgage to the Ohio Life Insurance and Trust Company, made on the 14th of July, 1836, to secure a loan of \$5,000.

This mortgage was executed by the then owner of the property covered by it, long before the plaintiff acquired its interest therein, and before the water power had become appurtenant to the mill lots. On the purchase by it of the water power and third parcel of lands, the Woollen Company assumed payment of the entire mortgage debt, which, in January, 1850, remained unpaid, and constituted a valid lien on the water power, and the third parcel of lands. At this time the mill lots were unincumbered.

January 10, 1850, the defendant, by policy in due form issued to the plaintiff, insured, to the extent of \$5,000, the fixed and movable machinery contained in the mill, for the term of six years. By the application, made part of the policy, the plaintiff is represented as the "owner" of this property.

May 2, 1850, the Woollen Company executed a mortgage to Stamp, Buckingham, and H. B. Curtis, upon the "mill lots," water power, and machinery contained in its mill, to secure a debt of \$10,000, payable in six months after that date. This debt and mortgage, subsequently vested by due assignment in David Potwin and H. B. Curtis, on the 29th December, 1852.

After the execution of the mortgage, the property of the plaintiff, in respect to incumbrances, stood in the following condition: —

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1. The water power was subject to each of the above named mortgages, of which that made to the Life and Trust Company constituted the first, and that held by Potwin and Curtis the second lien.

2. The mill lots and machinery were subject to the mortgage held by Curtis and Potwin, and to that alone.

3. The "other lands," constituting the third parcel, were subject to the mortgage executed to the Life and Trust Company, and to that only.

December 21, 1852, the Woollen Company leased to David Potwin its mill, water power, and machinery for five years from the first day of June, 1853, with liberty to take in one or more partners, under which Potwin took possession of the demised property, and afterward — but at what precise date does not appear — formed a copartnership with Henry B. Curtis for the manufacture of woollen goods, which they continued to prosecute in the mill until its destruction by fire, as hereafter stated.

At the March term, 1853, of Knox County common pleas, the Life and Trust Company filed its bill to subject the water power and the "third parcel" of lands, as well as other property not owned by the plaintiff, being the premises included in its mortgage, to the payment of the debt secured thereby; to which bill the company, and Curtis and Potwin, were made defendants, and duly served with process.

Curtis and Potwin answered, and, at the same time, filed a cross-bill, to which the Woollen Company and others were made parties and duly served with process, setting up their mortgage; that its condition had been broken; that a sale of the water power separate from the mill lots would work irreparable injury to them and the company, and praying that the mill lots and water power might be sold in one parcel, and the proceeds equitably apportioned between the company and themselves.

Such proceedings were afterward had that, at the August term, 1853, a decree was rendered in the cause, by which the court, after finding the liens of the respective mortgages to be as above stated, and that a separation of the water power from the factory premises would work great injury, directed that all the property, real and personal, of the plaintiff, covered by the two mortgages, should be sold by a master in the manner following: —

1. The land disconnected from the mill premises, which consti-

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tute the third parcel, and of which the Trust Company had the exclusive lien. The proceeds to be applied to the decree of the Trust Company alone.

2. The mill lots and the water power in *one* parcel ; and that out of the proceeds of this parcel, the Trust Company should first receive, if necessary to satisfy their claim, such proportion as the value of the water power bore to the value of the mill lots ; which proportion was to be ascertained by the master, and reported to court. Curtis and Potwin to have the residue of the proceeds from this parcel.

3. The machinery in the mill and "other personal property" in another parcel, the proceeds to be paid to Curtis and Potwin alone, as they held the exclusive lien thereon.

December 10, 1853, due notice having been given, and the water power and real estate (but not the machinery or any part of it) having been appraised, the master, acting under a proper writ, sold all the parcels, both of real and personal property, to Curtis and Potwin, as follows : —

1. The lands not connected with the mill premises, for the sum of \$2,667.

2. The mill lots and water power, for \$10,667, and,

3. The machinery and other personalty, for \$2,000 ; of this Curtis and Potwin had possession at the time of sale, and continued therein till its loss.

The master reported these several sales to the court — that the proportionate value of the water power was \$3,333, the mill lots being worth \$7,334, and that no money had been paid to the master by the purchasers.

December 20, 1853, Curtis and Potwin paid to the Trust Company \$423.92, which left a balance of \$5,000 due it on the decree, and gave its solicitors their due bills for that balance, with a written stipulation that, if it was not paid or satisfactorily arranged with the Trust Company before the next term of Knox common pleas, then the solicitors might, at their option, cause the sale to them (Curtis and Potwin), of the *real* estate named in the master's return, to be set aside. In that event, the due bill and money paid were to be restored.

This arrangement was made known to the court on the same day it was made (20th December, 1853), and on the same day it confirmed the sale of "the several parcels of said real estate in

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said writ and decree named," and ordered deeds to be made to the purchasers. By the same order, the court, after approving the finding of the master as to the relative value of the water power and mill lots, directed the proceeds arising from the sales of all the property to be applied as follows: —

1. To payment of costs,
2. To satisfy the decree in favor of the Trust Company, the proceeds of the water power and the other lands on which it held exclusive lien being more than sufficient for that purpose, and that, —
3. "The remainder, including the moneys made from the personalty, to be applied as a credit on the amount decreed to the said Curtis and Potwin."

The master was required to report, at the next term, the balance then due on the decree of Curtis and Potwin.

On the morning of the 23d December, 1853, the mill, with all the machinery contained therein, was destroyed by fire. The same day, but in ignorance of the fire, Curtis, who was then in Cincinnati, made a written arrangement with the Trust Company, in which it authorized its solicitors to receive, as payment on the decree, the note of Curtis and Potwin for \$5,000 payable in a year, with seven per cent. interest, provided the note was secured by a mortgage on real estate, to the satisfaction of their solicitors and a third person named.

Curtis and Potwin were abundantly able to have given this security, but in consequence of the fire declined to do so.

At the March term, 1854, of the Knox common pleas, an order was made, by which, after reciting that it appeared to the court "that no part of the purchase money arising from the sale heretofore made *and confirmed* in this case, has been paid, *and all parties consenting thereto*, it" was directed "that the sale and confirmation be set aside and held for nought."

By a subsequent order, made at the same term, the appraisal of the water power and mill lots was also set aside.

Afterward the water power, mill lots, and other lands, were sold by the master, in the same parcels as before, to Curtis and Potwin, for sums amounting in the aggregate to \$8,001.00, and sufficient of the proceeds for that purpose was applied to pay the decree of the Trust Company, and the residue as a credit on the decree of Curtis and Potwin. These sales were confirmed at the

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August term, 1854, and the master again ordered to report the balance due to Curtis and Potwin. No such report, however, had been made up to September, 1856, when this case was reserved here.

At the time of these sales and of the fire, Curtis was president, and Potwin general agent of the manufacturing company. Both were then and still are directors and stockholders, and Curtis ever since hath continued to be president.

BRINKERHOFF, C. J. If the sale, by the master commissioner of the court, of "the fixed and movable machinery" insured, worked a complete transfer and entire alienation of the property insured, the plaintiff cannot recover for any loss happening during the time such alienation and transfer remained operative; and this, —

1. On what seems to be a settled principle of the general law of insurance. "If property insured is sold, so that the assured retains no interest in it, and is subject to no risk or responsibility on account of it, and no assignment, or agreement for the assignment, of the policy is made, and afterward a loss happens, and after the loss the policy is assigned to the vendee, the assignment will be ineffectual in respect to such loss, *and neither the party originally insured, nor his assignee, can recover the loss; the original assured can recover nothing, for, having no interest in the property at the time of the loss, he has sustained no damage; nor can the assignee recover anything, because, at the time of the loss, he was not a party to the insurance.*" 1 Phil. on Insurance, 68, and cases there cited. And, —

2. From the terms of the defendant's act of incorporation and by-laws, indorsed upon the policy, and by which its stipulations must be considered as limited.

The twelfth section of the defendant's act of incorporation is this: "That when any building shall be alienated, the policy shall thereupon be void, and surrendered to the directors to be cancelled; the note shall be given up upon the payment of all assessments upon the same prior to such surrender; the policy may be assigned to the grantee or alienee, who may have the right thereto confirmed, for the use of said grantee or alienee, upon application to the directors within thirty days, and their consent, on giving proper security to the deposit note, and shall thereby become a member of said company."

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This section of the act of incorporation, it will be seen, relates, in terms, only to *buildings* insured ; but section 4, article 4, of the by-laws of the defendant, also indorsed on the policy, is as follows : —

“ Whenever any member of this company, who has an insurance on goods or other personal property only, shall *bond fide* alienate or set out said goods or other personal property, *he may have the same privilege of surrendering* or assigning his policy ; and in the same form and manner as is provided for in the twelfth section of the act of incorporation, in the case of the alienation or sale of buildings.”

Now, this provision of the by-laws, though not an *express* stipulation against alienation, proceeds throughout on the *assumption* that alienation would avoid the policy, and shows, at least, that the parties contracted in view of, and by their contract recognized, the rule of the law above given, to wit, that total alienation of the property insured would avoid the policy.

But one question then remains : Did the sale by the master under the decree work a complete transfer of the “ fixed and movable machinery ” insured ? For, if the property was effectually sold and disposed of under a mortgage made by the assured, it is, in effect, a sale by the assured.

In considering this question it is important to notice that there was but one lien upon this personal property insured, to wit, that of Potwin and Curtis, who were, at the time of the sale, already in possession as lessees of the assured ; while upon the real estate sold there were other and conflicting liens. But to the proceeds of the sale of the personal property, and to which alone the insurance extended, Potwin and Curtis alone were entitled.

This personal property was properly ordered to be sold separately, and was sold separately, and for a separate price, to Curtis and Potwin, for a sum less than the amount due them under the decree, and the amount of this sale was applied, by the subsequent order of the court, to the satisfaction, *pro tanto*, of their decree. No change of possession was necessary or possible in order to complete the sale, for the purchasers were already in possession ; no payment of the purchase money to the master was necessary, for it was all coming to the purchasers. The property sold being personalty, no need of confirmation was required. Nothing further was required, if anything, but an order apply-

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ing the proceeds of the sale to the satisfaction, *pro tanto*, of the decree standing in favor of the purchasers, and this was made; and it seems to us that the sale then stood, for the time being, a transaction perfected and complete. We can see no act or element which was wanting to its completeness; we can imagine none which would have rendered it more complete.

While this state of things continued, it is clear, we think, that the purchaser, as such, could have vindicated by any appropriate action their perfect title to this property as against all the world. It would have been perfectly competent for an utter stranger to have bought this property separately from the real estate, at the master's sale. Suppose one had done so, had paid the amount of his bid, and that amount had been, by order of the court, applied to the decree in favor of Potwin and Curtis. It seems to us clear that his title to it would have been perfect; that he might have removed and transported it wheresoever he pleased, and have maintained his title to it against all parties. And wherein is there any essential distinction between his supposed condition and rights and those of Potwin and Curtis, after their purchase and the application, by order of the court, of the amount of their bid to the payment of their decree? We can see none.

A question of construction is made, as to whether the subsequent order of the court setting aside the sale really embraced the sale of this personal property, or whether it extended only to the sale of the real estate. But, granting that such order did extend to the personalty as well as realty, and that it was competent for the court to make such order, still, this was the condition of things for several months before the sale was set aside; and in this state of things the property was destroyed by fire.

Now, suppose this property had never been destroyed by fire, but that large losses by the burning of other property insured by the defendant had occurred during the interval between the making and the setting aside of this sale. Could the plaintiff have been assessed on its premium note to make good such losses? It seems to us very clear that it could not; and that on a suit being brought for the collection of such supposed assessment, an answer alleging an alienation prior to the occurrence of such losses, and proof of the facts apparent in the record of the case in which the sale to Potwin and Curtis was made, would have been a conclusive defence.

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Does the fact, that the sale was, subsequently to the destruction of the insured property, set aside by the order of the court under whose decree it was made, alter the case? We think not. But two reasons are stated in the order for setting aside the sale: first, that the purchase money had not been paid; and second, that all parties consented thereto. The first reason could have no application to the sale of the personal property; for, there being no occasion for the payment of the purchase money as to it, its non-payment could afford no reason for setting it aside. The consent of all parties may have been a good reason to justify the action of the court in setting aside the sale as to those parties; but we cannot rid ourselves of the impression that such action of the court, based upon and obedient to the will of the parties, ought not to be permitted to affect the rights, previously fixed, of persons who were not parties, and whose interests were not consulted in the matter. It ought not to be in the power of the plaintiff, or of parties similarly situated, to escape the burden of assessments in case the insured property remains unscathed, and to insist on compensation, in case of its destruction, at their mere will and pleasure.

It may be, and, indeed, it would seem — though the question is not before us, and we therefore do not now undertake to decide it — that, had this insured property not been destroyed during the interval between the time of the sale and of the order setting it aside, the obligations of the policy would, on the setting aside of the sale, have revived; and that the defendant would have been liable for any loss occurring subsequently to that time, and during the period covered by the terms of the policy. 1 Phil. on Insurance, secs. 107 and 180; *Lane v. Maine M. F. Ins. Co.* 12 Maine R. 46; ¹ *Dadmun Man. Co. v. Worcester Mut. F. Ins. Co.* 11 Metc. 429; ² *Power v. Ocean Ins. Co.* 19 La. R. 28.

Be this as it may, we are of opinion that the plaintiff is not entitled to recover for any loss occurring between the time of the sale and the time of setting it aside. As to that interval, we think the rights of the plaintiff under the policy were, at least, suspended.

The consent of the plaintiff to the order setting aside the sale may have been ill-advised and unfortunate to some of its stockholders; but with that question we have, in this case, nothing to do.

Judgment for defendant.

¹ *Ante*, vol. 1, p. 482.

² *Ante*, vol. 2, p. 488.

Misrepresentation by Company's Agent.

TUCKER vs. PROVINCIAL INSURANCE Co.¹ (Court of Chancery, Upper Canada, 1859.) *Other Insurance.*

The agent of an insurance company effected an insurance upon wheat in the name of himself and partner for the sum of £3,000, there being at the same time an insurance on the mill in which the wheat was stored of £750; the rule of the company being, that not more than £3,000, should be taken on any one building and its contents. The usual proposal was transmitted by the agent to the head office on the 23d, and on the 27th of the same month the premises and wheat were destroyed by fire, no action in the mean time having been taken by the company upon the application sent in by their agent, who, in making the proposal had refrained from drawing the attention of the company to the fact of the previous insurance on the building; and the then secretary of the company swore that had he been aware, or had his attention been drawn to the fact of such prior risk, the second application would have been immediately rejected. After the loss occurred the company paid the sums of £750 (insured on the building), and £3,250 (on the wheat), together making the sum of £3,000 allowed by the rules to be on one building and its contents. Under these circumstances a bill filed by the agent and his partner to compel the payment of the additional £750 was dismissed with costs.

ENOCH RICHARDSON vs. MAINE INSURANCE Co.²

(Supreme Court, Maine, Washington County, 1859.)

Misrepresentation by Company's Agent.

The company's agent, on request for insurance by letter from the plaintiff, made out an application containing a material misrepresentation, — the fact not being known to the plaintiff. *Held*, that the policy which thereupon was issued was void.

TENNEY, C. J. Israel Cox was the agent of the Maine Insurance Company in soliciting applications for insurance. In the month of August, in the year 1855, he was at the plaintiff's place of business in Jonesborough, and viewed his store and took some admeasurements, and represented to him that he was ready to obtain insurance on his buildings, &c., but at that time no application was made by the plaintiff.

On Sept. 25, 1855, the plaintiff wrote to Cox, requesting him to obtain, in some good stock insurance company, insurance on his store and goods, and on another building standing upon his land, in which he stored some merchandise. A policy was obtained by Cox from the Maine Insurance Company, insuring against loss by fire, for one year from Oct. 3, 1855, the property referred to in the letter; and on Oct. 6, 1855, Cox sent the policy to the plaintiff. The buildings and the greater part of the goods insured were destroyed by fire on Nov. 29, 1855. The defendants deny their liability, because in the application annexed to the policy, which has the name of the plaintiff as the applicant,

¹ 7 Grant's Ch. & Ap. 123.

² 46 Me. 394.

signed by Cox, to a part of the seventh interrogatory, whether there was any mortgage upon the property, it is answered, "No mortgage;" and it is admitted that there was an outstanding mortgage upon the land on which the buildings stood, and upon which was due the sum of two hundred dollars.

The policy contains the following language: "This policy is made and accepted in reference to the application for it and to the conditions herein annexed, which are hereby made a part of the contract, and are to be resorted to in order to ascertain and determine the rights and obligations of the parties hereto, in all cases not herein otherwise expressly provided for. And the assured, by his acceptance of this policy, covenants and engages that the said application contains a just, full, and true statement of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, and that if any fact or circumstance shall not have been fairly represented, the risk taken by this company shall cease and this policy shall be void."

The plaintiff treats the application in his letter of Sept. 25, 1855, as the only one in the case which can affect him, and says the denial of the existence of a mortgage upon the property is not *his* denial.

It is not improbable that the answer to the seventh interrogatory in the application, which is annexed to the policy, was not noticed by the plaintiff when he received it from Cox. But as he received the policy, paid the premium, and has instituted the present suit, he must be regarded as having received and accepted the present policy as it issued from the company. If he did not so receive and accept it, he has no ground of action thereupon.

By the acceptance of the policy, according to the terms just quoted, the plaintiff covenanted and engaged that the application contained a just, full, and true statement, &c., in regard to the condition, &c. He must, therefore, have ratified the acts of Cox, in affixing his signature to the application, and in the answers to the several interrogatories therein, and the same are to have the effect they would have if the signature was made with his own hand.

The question is not so much what the plaintiff stated or represented in his letter to Cox of September 25, 1855, but upon what representations, statements and denials, and warranties the insurance was made by the company. It does not appear that the di-

Misrepresentation by Company's Agent.

rectors of the company had any knowledge of this letter, and the policy could not have issued upon the facts therein stated alone.

It is true, Cox, the agent of the company, knew all which was contained in the letter; but the policy, which is the sole basis of the present action, from its terms, was not executed upon the application contained in that letter, and the company cannot be holden, as they might be, if the letter was referred to as containing the statements, &c., as a part of the contract.

The policy is countersigned by Cox, as the agent of the company, after the execution thereof by the president and secretary, in obedience to a provision that the same may become binding upon the parties. But such countersigning cannot alone make the policy effectual, as issued upon the application in the plaintiff's letter to Cox of September 25, 1855. *Lowell v. Mid. M. F. Ins. Co.* 8 Cush. 127.¹

But it is insisted, in behalf of the plaintiff, that the erroneous answer to the seventh interrogatory in the application is entirely immaterial in a stock company, which has no lien upon the real estate upon which the property insured is situated. In *Davenport v. Mutual Fire Ins. Co.* 6 Cush. 840,² the court held that a similar representation, in an application for insurance, was clearly material, irrespective of the lien. And the doctrine of this case is affirmed in the case of *Packard v. Agawam M. F. Ins. Co.* 2 Gray, 334.

Parties to all contracts in writing are supposed to have the intentions which are clearly manifested by the terms thereof. And when one party is bound only by a compliance, by the other, with certain conditions expressed, and those conditions are not complied with, the former party cannot be by law holden. In the case before us, the conditions, &c., make a part of the contract. They are free from ambiguity and doubt. A statement in the application, which is one of the conditions, is not in fact true, though no moral wrong is imputed to the plaintiff. The court cannot withdraw this statement from its consideration. The parties have made it essential; and to disregard it would be the substitution of another contract for that made by the parties.

Again, it is contended for the plaintiff that, upon the construction claimed for the company, the "condition, situation, value, and risk" of the property insured could have had no reference to the outstanding mortgage. The store and the barn were covered by

¹ *Ante*, vol. 3, p. 240.

² *Ib.* p. 129.

the mortgage. The company deemed it important to know everything which the questions in the applications were suited to elicit. Whether there was a mortgage upon the property upon which the insurance was sought, was one of these important questions. This question had a relation to this property. And it cannot be denied that this question had some reference to the condition and situation of the property, touching the title thereto, and that the value of the insurable interest of the plaintiff, and the risk of the insurers, was essentially involved.

The risk of the company was to cease, and the policy was to be void, if any fact or circumstance had not been fairly represented. The contract contained no provision that the risk should continue in relation to that portion of property insured, concerning which no misrepresentation had been made in the application; but it was entire, and the risk was to cease, and the policy to be without effect, on the discovery of the existence of such facts or circumstances. *Brown v. People's M. F. Ins. Co.* 11 Cush. 280.¹

According to the agreement of the parties, the plaintiff is to become *Nonsuit.*

APPLETON, CUTTING, MAY, and DAVIS, JJ., concurred.

LEVI BARTLETT vs. UNION MUTUAL FIRE INSURANCE CO.²

(Supreme Court, Maine, Waldo County, 1859.)

Preliminary Proofs. — Waiver. — Limitation Clause.

Objections to the proofs of loss cannot be first made at the trial.

The by-laws of a company provided, that upon notice of loss the company should proceed to ascertain the amount thereof, and settle the same within three months; and if the assured was dissatisfied he might sue within three months thereafter, but not later; and he must sue in the county of M. *Held*, that this provision did not apply to cases in which the company neglected altogether to proceed to the determination of the loss.

Held, also, that the provision as to the place of suit was not binding.

APPLETON, J. The defendants were incorporated by the Legislature of New Hampshire. By section 8 of their charter, it is enacted that, "in a case of any loss or damage by fire, happening to any member, upon any property insured in and with said company, of either class, the said member shall give notice thereof in writing to the directors, or some one of them, or to the secretary of said company, within thirty days from the time such loss or damage may have happened, under oath," &c.

¹ *Ante*, vol. 8, p. 588.

² 46 Me. 500.

Preliminary Proofs. — Waiver. — Limitation Clause.

By the by-laws of the defendant corporation, article 15, the insured is required, within thirty days, "to deliver to the secretary of said company a particular account, on oath, of the property lost or damaged, and the value thereof at the time of the loss, and shall state whether he was the sole owner of the same at the time of the loss; and if it is now, was at the time of its insurance, or has since been incumbered by a mortgage or otherwise; and whether any insurance has subsisted in any other office upon the same since insurance was effected at this office; the cause or occasion of the fire, as far as it is known, and the value of such parts as remain; until which shall be done, the amount of such loss, or any part thereof, shall not be payable," &c.

Within thirty days after the loss, a notice thereof, sworn to by the plaintiff, was forwarded by mail to the defendants, and received by them. The notice thus forwarded is not produced, nor does it distinctly appear whether or not it fulfils all the requirements of article 14.

The preliminary notice of the loss is in compliance with the by-laws of the company, or it is not.

If the notice given was in accordance with the by-laws, the defendants have no cause of complaint.

If it fails to contain all the facts required, and is deficient in some particulars, the defendants have not notified the plaintiff of such deficiencies so that they could be corrected. After receiving the notice, they have negotiated with the plaintiff for the adjustment of the loss, without disclosing any defects in the notice, or giving an intimation of an intention of taking advantage of any, if any there be. The technicalities of special pleading are not to be expected, and should not be required in matters of this description.

The conditions in policies of insurance, requiring an account of the loss, should, in such cases, be construed liberally in favor of the assured. *McLoughlin v. Washington County M. Ins. Co.* 23 Wend. 525; ¹ *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385.² "Good faith," remarks Ruggles, J., in *O'Neil v. The Buffalo Fire Ins. Co.*³ 3 Coms. 122, "on the part of the underwriters, requires that if they mean to insist upon a merely formal defect in the preliminary proofs, they should apprise the assured of the nature of the objection, so as to give him an opportunity of supplying the defect, and if they neglect to do so, their silence should be held a

¹ *Ante*, vol. 2, p. 17.² *Ante*, vol. 1, p. 576.³ *Ante*, vol. 3, p. 103.

waiver of the defect." The same views were affirmed in *Bumstead v. The Dividend Mut. Ins. Co.* 2 Kernan, 81.¹ In *Clark v. N. E. Mut. Fire Ins. Co.* 6 Cush. 343,² the notice given was deficient in some particulars; but as the refusal to pay the loss was not put on the ground of any defect or insufficiency in the notice, the company were regarded as having waived any further or different notice. In *Underhill v. Agawam Mut. Fire Ins. Co.* 6 Cush. 440,³ the by-law is identical with that of the defendant corporation. In that case it was urged that the notice was insufficient; "but," says Dewey, J., "the court are satisfied that it is a good and sufficient answer to the objection now urged to this notice, that no such objection was taken to the form of the notice when it was given, or any further, or more particular information requested; but the refusal to pay the sum stipulated in the policy by the insurers was upon other grounds, and thereby the want of more full and particular statements in the notice must be taken to have been waived."

If the notice was defective, which, as it is in the defendants' hands, might easily have been shown, the defendants have waived any exceptions for that cause.

By section 8 of the act of incorporation, and by article 15 of the by-laws, it is provided that, upon notice of the loss, "the directors shall proceed as soon as may be to ascertain and determine the amount thereof, and shall settle and pay the same *within three months* after such notice; but if the assured shall not acquiesce in their determination, his claim may be submitted to referees, or he may, *within three months* after such determination, *but not after that time*, bring an action at law against said company for such loss; which action shall be brought at a proper court *in the county of Merrimack*," &c.

Having received notice of the loss, the defendants should have objected if it was not sufficiently formal, or was deficient in the information required by the by-laws. If they were satisfied with the notice received, they should have proceeded to ascertain and determine the amount of the loss. No reasons are given for not doing this. It was in no respect the fault of the plaintiff that it was not done, and he should not suffer therefrom. The directors, by neglecting, or refusing to do their duty, cannot deprive the plaintiff of his right of action. *Boynton v. Middlesex Mut. Fire*

¹ *Ante*, vol. 3, p. 775.² *Ib.* p. 131.³ *Ib.* p. 140.

Alienation.

Ins. Co. 4 Met. 212.¹ These provisions contemplate a case when a loss has been admitted, and the amount affixed by the directors, and the only question is, whether the insured is entitled to recover more. In *Nevins v. Rockingham Fire Ins. Co.* 5 Foster, 22,² this question arose, and the court held the action was maintainable after the time limited in the by-laws, when the directors had for any cause omitted to ascertain and determine the loss within the time limited for that purpose. "The defendants," says Perley, J., in the case last cited, "are within the immunity and privilege of the charter, which requires them to be sued in a particular court, and within a certain time, *only* when they have determined the question of loss according to the act, and their implied undertaking with the plaintiff."

In *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 Gray, 596, *ante*, the directors determined the amount of the loss and notified the plaintiff of their determination. In *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 171, *ante*, the action was seasonably commenced, but it was insisted that it was brought in the wrong county. The cases cited for the defence, it will be perceived, do not sustain the position that the present action was brought too late.

After a contract has been broken, the remedy is regulated by law, and must be governed by that of the forum where redress is sought. The provision, therefore, that any suit should be brought in the county where the company is established is not binding on the assured. *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174, *ante*; *Hall v. Mechanics' Mut. Fire Ins. Co.* 6 Gray, 185, *ante*; *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 Gray, 596, *ante*. And most certainly the defendants are not entitled to this privilege, when they have entirely failed to perform those duties, upon the performance of which alone they can pretend to any claim for such an exemption as they rely upon in this case. *Nevins v. Rockingham Fire Ins. Co.* 5 Foster, 22.³ *Defendants defaulted.*

TENNEY, C. J., and RICE, CUTTING, MAY, and KENT, JJ., concurred.

SEWALL P. TOMLINSON vs. MONMOUTH MUTUAL FIRE INSURANCE Co.³ (Supreme Court, Maine, Lincoln County, 1859.) *Alienation.*

The insured mortgaged his premises, and afterwards released his equity of redemption, taking back a bond of defeasance; which, however, he failed to record. The policy containing a provision that the contract was to be absolutely void in case of alienation, *held*, that the insured could not afterwards recover for the destruction of the building by fire.

¹ *Ante*, vol. 2, p. 181.

² *Ante*, vol. 3, p. 376.

³ 47 Maine, 232.

Non-disclosure.

WM. GOULD vs. YORK CO. MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Maine, Franklin County, 1859.)

Non-disclosure.

The non-disclosure of the fact that goods insured are kept in the name of the insured and another, will not affect the validity of a mutual policy, where the insured is sole owner of the goods.

The existence of a mortgage on property insured which is described as unincumbered avoids the policy; and *held*, immaterial whether the existence of the mortgage was known or not to the assured.

THE case is stated in the opinion.

TENNEY, C. J. The goods covered by the policy were owned by Benjamin Gould, the father of the plaintiff, prior to April, 1856, when they were purchased by the latter, and were entirely his property. While they were owned by the father, according to the evidence, the business was done in the name of B. & W. Gould, the son consenting that his name should be so used. After the purchase, goods were bought and business carried on by the son in the name of B. & W. Gould, the father consenting thereto. The case contains no evidence that any part of the goods was purchased on credit. The judge was requested to charge the jury, that, if the goods were bought in the name of B. & W. Gould, and partly on credit, it would constitute such a fraud, or breach of warranty, as would avoid the policy; that purchasing the goods in the name of the firm constitutes them partnership goods. These instructions were not given; but the jury were instructed, if the father authorized the plaintiff to use his name, as he did use it, in the purchase of goods, and the goods were in fact the sole property of the plaintiff, the use of the father's name would not affect the legal rights of the parties. The evidence touching the ownership of the goods is not in the least in conflict with the representations in the application or the terms of the policy; and there is nothing in that evidence which tends to show that the risk of the company was in any degree increased. The instructions requested were properly withheld, and those given upon this point free from error.

The policy refers to the application as part thereof, and it is made subject to the provisions and conditions of the charter and by-laws, and the lien on the interest of the person insured, in any personal property or building covered by the policy, and the

¹ 47 Maine, 403.

Non-disclosure.

land under said building. It is provided, in the application, that any concealment of the condition or character of the property will make the policy void. The 14th interrogatory in the application is, "If incumbered, state for how much and to whom. State the true title and interest." The answer to this interrogatory is, "None."

It is in evidence that, at the time of the application and the issuing of the policy, there was upon the real estate insured a mortgage, on which there was due the sum of two hundred dollars. This answer was manifestly material, and became a warranty by the terms of the contract. *Battles v. York Co. Mut. Ins. Co.* 41 Maine, 208, *ante*. This was a misrepresentation, and a breach of the contract, and, by the instructions of the judge, the policy was absolutely void, so far as it referred to and covered the real estate insured. This part of the instructions was correct.

But the jury were further instructed that, if the misrepresentation was made fraudulently, the whole policy was void, and the plaintiff could recover nothing; but, if the representation that the store was free from incumbrance was made inadvertently, in good faith, he believing it to be true, and he had no knowledge to the contrary till the day before the commencement of the trial, then said erroneous representation would not avoid the policy of insurance upon the goods insured, and that he would be entitled to recover for the goods insured, according to the terms of the agreement, as stated in the policy. Exceptions taken to the latter portion of these last instructions are relied upon.

The company had a lien on the land and the store which contained the goods, and upon the goods themselves, not only for the payment of the note given for the premium, but for the payment of assessments made on account of losses. In the policy and the application, no distinction is made between an incumbrance for a small sum compared with the value of the real estate insured, and a sum which is nearly or quite equal to the whole value, in relation to the question whether the policy is avoided by such misrepresentation. In the latter case supposed, the company would hold a position far less favorable than in the former, as to the goods insured, as well as to the real estate. In a policy like the one in question, the real estate insured is security for the goods covered by the same policy; and, if the real

estate, as owned by the assured, is of little or no value, it can be security for the intended purposes only in proportion to the insurable interest of the applicant.

Is there ground for the distinction made by the judge, as to the intent with which the misrepresentation was made, in its effect upon the insurance of the goods?

It is immaterial, in regard to misrepresentation in obtaining insurance, whether it is made fraudulently, or by mistake, or accident; the effect is the same. A policy obtained by misrepresentation is, in legal intendment, no insurance at all; it has no legal effect. *Clark v. N. E. Mut. Ins. Co.* 6 Cush. 342.¹

In *Carpenter v. American Ins. Co.* 1 Story, 57,² Story, J., says: "A false representation of a material fact is, according to well settled principles, sufficient to avoid a policy of insurance, underwritten on the faith thereof, whether the false representation be by mistake or design." "The representation, made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal or not. The ground in each case is the same. The underwriters are deceived. They execute the policy on the faith of statements material to the risk, which turn out to be untrue. The mistake is therefore fatal to the policy, as it goes to the very essence of the contract." The same principle was laid down by Lord Mansfield, which has not been denied to be correct. He says: "Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is vastly different from the risk understood and intended to be run at the time of the agreement." *Carter v. Boehm*, 3 Burr. 1905, 1909.

The policy was void by reason of the misrepresentation in regard to the incumbrance, irrespective of the question whether it was fraudulent or made through an honest misapprehension of the facts; and, by the terms of the policy, including the application, charter, and by-laws, which make a part thereof, it became void. The contract being entire, and one premium note given, the lien for the security of the same was affected by the erroneous answer. *Richardson v. Maine Ins. Co.*, decided by this court in 1859, not yet reported; *Brown v. People's Mut. Ins. Co.* 11 Cush. 280.³

¹ *Ante*, vol. 3, p. 131.² *Ante*, vol. 2, p. 120.³ *Ante*, vol. 3, p. 583.

Explosion of Gunpowder.

The plaintiff testified that, at the time of the fire, some 1,500 pounds of paper rags were in the store, which were destroyed; these he had taken in from time to time. The defendants requested the judge to instruct the jury that if rags were kept in the store insured, and which contained the other property insured, during the time said property was insured by the defendants, the policy would be thereby avoided. 2. If rags were so kept during any portion of the time the same were insured, it avoids the policy. These instructions were not given.

The 8th question put to the plaintiff, in the application, is, "Is cotton or woollen waste, or rags kept in or near the property to be insured?" The answer is, "None." It does not appear, affirmatively, that this answer was untrue at the time it was made. And no provision is found in the policy, or the charter and by-laws, that, if such articles shall thereafterwards be kept, the policy shall be avoided.

Exceptions sustained. Verdict set aside, and new trial granted.

RICE, APPLETON, GOODENOW, and DAVIS, JJ., concurred.

GREENWALD vs. INSURANCE CO.¹

(District Court, Philadelphia, 1859.)

Explosion of Gunpowder.

A clause in the policy of fire insurance that the insurers should not be liable for a loss from an explosion of gunpowder, applies to the case of a fire originating from the explosion of gunpowder on the premises.

Where, to stop the spread of flames, a house already on fire is blown up with gunpowder, there being no means of extinguishing fire by water in the town, the insurers are liable.

THIS case came up on a rule for new trial on points reserved. The opinion of the court was delivered by

SHARSWOOD, P. J. The question whether the alleged defects in the preliminary proofs had been waived, was left to the jury, and their verdict, unless there was absolutely no evidence, a court ought not to interfere with on such a question. Here the only evidence was, that when the first papers were presented, certain objections were made; another was prepared, which, in the opinion of the only witness examined, obviated those objections. That last paper was received by the officer of the company, with the remark that he would look over the papers, and if satisfactory, all would be right. The case of *Bumstead v. Dividend Mutual Ins. Co.* 2 Kernan, 81,² holds that the recep-

¹ 3 Phila. 323.

² *Ante*, vol. 3, p. 775.

Explosion of Gunpowder.

tion of such papers, without objection to their form, is evidence of a waiver of any merely technical defects in this respect. As to the main point reserved, it appeared that the property insured, a stock of merchandise in a frame store building, was situated in the town of Americus, Georgia, in which there were no means of extinguishing a fire by the use of water. It appears that the fire in question did not originate on the premises insured, but it had reached them, and they were burning, when the citizens assembled, with a view to extinguish the fire and prevent its spreading farther, applied gunpowder to them and blew them up. Had this measure been resorted to before the fire had actually begun its work of destruction on the property insured, it might be a question whether the underwriters would be liable. *Hillier v. Alleghany Mut. Ins. Co.* 3 Barr, 470,¹ might be an authority in that case. But here, altogether apart from the fire caused by the explosion, the proximate loss was a fire not caused by an explosion. The case is like the destruction of goods by water applied to extinguish the flames which had caught them or the building in which they are stored. If left to themselves, they would have been inevitably destroyed by the fire; it would last as long as it had fuel to feed on. It is certainly very much against the true interests of insurers to raise objections founded on the honest efforts of the insured or others to prevent the spread of fires, much more to frame causes meant to make the right of recovery depend upon what is or is not done by strangers or others present at the fire. Life, indeed, as well as property, is often in peril; but where it is not, men might be disposed under such circumstances, out of regard to the insured, to stand still and let property perish, rather than imperil by interfering his claim for indemnity against the insurers. It would be a novel clause to introduce into a policy, that in case of fire, the insurance should be void if any water were applied to extinguish it. Quite as novel would it be were it provided that if there were no water nothing else should be done. Yet the defendants in this case have told us that the clause that the insurers should not be liable for an explosion by gunpowder, was meant to guard against the very thing which had been done. Had the citizens of Americus, instead of resorting to gunpowder, have succeeded in any other way in separating the building in ques-

Ante, vol. 2, p. 497.

Notice of Loss. — Other Insurance.

tion from those contiguous to it, we would probably have been told that it was destruction by a mob, against which there is a provision in most policies, if not in this. We construe this clause differently, and more for the interest of the underwriters when we say, that fire originating from an explosion of gunpowder was what was meant to be guarded against, and not an honest effort, even if it was injudicious, on the part of those present to stop the flames. *Rule discharged, and judgment for plaintiff.*

FRANKLIN FIRE INSURANCE CO. vs. MASSEY.¹ (Supreme Court, Pennsylvania, Philadelphia, 1859.) *Revocation of Contract.*

A policy of insurance against fire was effected by the agent of an insurance company, for the term of one year, and also for any future time or times for which a premium should be paid, and indorsed on the policy, or otherwise acknowledged in writing, by the secretary, or other authorized officer of the company for the time being; the policy was several times renewed, the premium being paid to the agent, and by him thereon indorsed; after the last renewal, the company instructed their agent to return the premium and cancel the policy; this was communicated to the insured, but the agent having no funds in his hands, did not return the premium until a loss had occurred by fire within the terms of the policy: *Held*, that the agent was a duly authorized officer of the company, empowered to bind them by a renewal of the policy, and that they were liable for the loss.

The company having received the premiums, and ratified the previous renewals of the policy, were bound by the act of their agent, in the absence of evidence that he had no such authority, and that this want of power was known to the insured.

An action of debt will lie on a policy under seal, renewed by a parol indorsement, in the name of an assignee of the party originally insured.

INLAND INSURANCE AND DEPOSIT CO. vs. STAUFFER.² (Supreme Court, Pennsylvania, Harrisburg, 1859.) *Notice of Loss. — Other Insurance.*

A policy of insurance against fire provided that all persons assured, sustaining any loss or damage by fire, should *forthwith* give notice to the secretary, or other authorized officer, and as soon as possible after deliver in as particular account of their loss or damage as the nature of the case would admit of, and produce to the company satisfactory proof thereof: *Held* (1.) That proof of notice of the loss, if not waived, was a condition precedent, and essential to the plaintiff's right to recover.

(2.) That the neglect to give such notice could not be compensated by a deduction from the claim of the assured.

(3.) That a director of the company was not an authorized officer to whom such notice could be given.

(4.) That such notice might be waived by the insurers; and that the jury might find from the conduct of the parties whether there had been such a waiver.

A policy of insurance provided that in case of subsequent insurance of the same property, notice thereof should, with all reasonable diligence, be given to the company, &c., in default whereof, the policy should be void; the party effected a subsequent insurance, and before notice the premises were destroyed by fire: *Held*, that it was error to instruct the jury that, if there was no want of reasonable diligence in giving notice, the plaintiff was not in default, there being no evidence that notice was ever in fact given.

¹ 33 Penn. St. 221.² 33 Penn. St. 397.

Alterations.

SYKES *vs.* THE PERRY COUNTY MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Pennsylvania, Harrisburg, 1859.)

Alterations.

A policy of insurance against loss by fire, provided that in case of any alteration, &c., to the building insured, notice thereof should be given to the secretary or agent of the insurance company, and that in default, the policy should be void; the insured subsequently erected a steam-engine upon the premises. *Held*, 1. That notice to the agent of the company could not be proved by evidence of conversations with third parties, in which the erection of the steam-engine was spoken of; 2. That knowledge of the fact by the agent did not affect the company with knowledge, though notice to the agent would do so.

THE opinion of the court was delivered by

READ, J. The question in this case is narrowed down to a single point, whether the notice of a material alteration in the building insured, by the erection of a steam-engine, was given in conformity to the fourteenth provision of the by-laws attached to, and printed with, the policy, and expressly made a part thereof by the contract of the parties. This by-law, numbered V. in the printed proposals, provides that in such case "application must be made to the secretary, or any agent, who shall examine the premises, and certify his opinion whether the hazard be thereby increased or not; and if not increased, the secretary shall enter on the record of said policy, 'altered but not endangered;' but in case the secretary or agent shall judge such alterations or additions, &c., do increase the risk, he shall say how much, and take an additional note for such increased risk; and the secretary shall enter a minute thereof on the record of said policy. Upon failure to give the notice herein prescribed, the policy or policies shall become and be void, from the commencement of such alterations, &c., and the company shall not be liable for damages for fire in such cases."

It is not pretended that any notice in the form thus prescribed was given to the secretary, or to the company, nor even to any agent. It is not said that any direct notice of any kind was given to the agent; but it was asked that, from casual conversations of third persons with the agent, notice to him is to be inferred. No such inference could be drawn from the evidence as stated, and the court were therefore correct in saying so to the jury.

¹ 34 Penn. St. 79.

Non-disclosure. — Contiguous Structure. — Evidence. — Double Insurance.

If there was no evidence of notice to the agent, there was clearly none to the company, for it is not alleged that it came in any other way than through him. For these reasons, in addition to those assigned by the learned judge in the court below, the judgment is affirmed. *Judgment affirmed.*

INDEPENDENT MUTUAL INSURANCE CO. vs. AGNEW.¹ (Supreme Court, Pennsylvania, Harrisburg, 1859.) *Goods Lost or Stolen.*

The value of goods lost or stolen, whilst in process of removal from a building actually on fire, is recoverable in an action on a policy of insurance against fire. It is a loss within the terms of the policy.

GARRETT, executor of Taylor, vs. PROVINCIAL INSURANCE CO.² (Queen's Bench, Upper Canada, Michaelmas Term, 1859.) *Agreement to keep Water on the Premises. — Effect of Non-performance.*

Where by a policy of insurance the insured agreed to keep twelve pails full of water on each flat of the building during the continuance of the policy, and he neglected to do so, but it appeared that the loss was not in any way affected by his default, *held*, that nevertheless he could not recover.

RICHMONDVILLE UNION SEMINARY vs. HAMILTON MUTUAL INSURANCE CO.³

(Supreme Court, Massachusetts, January, 1860.)

Non-disclosure. — Contiguous Structure. — Evidence. — Double Insurance.

The by-laws of an insurance company, to which their policies were expressly made subject, provided that their risks should be distributed into four classes, one of which included "carpenters' shops;" that the application should be part of the policy, and "a warranty on the part of the assured;" and that an omission in the application to "make a true representation of the property, so far as concerns the risk and value thereof," should avoid the policy. An application for insurance on a building in a less hazardous class contained a covenant that it was "a correct description of the property, so far as regards the condition, situation, value, and risk of the same; and that neither the building described nor any other within one hundred and fifty feet is used for more hazardous purposes than is herein stated;" and this interrogatory: "What is the distance and direction from each other and from other buildings within one hundred and fifty feet, and for what purposes are said buildings occupied?" *Held*, that an omission to disclose a structure of rough timber forty-five feet long by twelve to eighteen feet high, within fifty feet of the property insured, made for the use of the carpenters employed to erect the building insured, did not avoid the policy, unless found by the jury to be a carpenter's shop, or unless, from the materials usually deposited therein, and the use to which it was devoted, its disclosure would have increased the premium of insurance.

In an action upon a policy of insurance the defendants put in evidence a diagram of the property insured, without date or signature, but referred to in the application as of a cer-

¹ 34 Penn. St. 96.

² 20 Up. Can. Q. B. 200.

³ 14 Gray, 459.

Non-disclosure. — Contiguous Structure. — Evidence. — Double Insurance.

tain date and sent to them by a certain person. *Held*, that the admission of a letter so dated and signed, and which had accompanied the diagram, as containing representations made by the plaintiffs, but not as proof of any facts therein stated, was unobjectionable.

The by-laws of an insurance company, to which a policy was made subject, provided that in case of double insurance the company should be liable to pay only such proportion thereof as the sum insured by them should bear to the whole amount insured thereon. Upon the face of the policy were written the words, "Additional to \$9,000 insured in other offices, and \$8,000 to be insured in other offices. The application for insurance stated that there was \$9,000 already insured, and "\$8,000 wanted in other companies." *Held*, that the company's liability was to be calculated by the amount of insurance actually procured, and not by the amount thus stated.

ACTION OF CONTRACT upon a policy of insurance for \$3,000, made by the defendants, a mutual fire insurance company, "in its second class," to the plaintiffs "on their seminary building and fixtures attached, in Richmondville," N. Y. On the face of the policy, immediately after the description of the property, were written these words: "Additional to \$9,000 insured in other offices, and \$8,000 to be insured in other offices."

The policy was declared by printed clauses on its face to be made "under the provisions, conditions, and limitations of the charter and by-laws of said company," and subject to their lien on the interest of the assured in the property; and to be "accepted by the insured, subject at all times to the conditions and regulations of the act of incorporation and by-laws of said company for the time being in force, which conditions and regulations are hereby declared to form a part hereof."

The by-laws contained these provisions: By the fifth article "the property insured by said company shall be divided into four classes," of which the second "shall consist of dwelling-houses, barns and their contents, in towns and villages, together with other property not deemed by the directors more hazardous;" and the fourth, of various mechanics' shops and manufactories, including "carpenters' shops."

"Art. 6. The application upon which a policy is founded shall be held to be a warranty on the part of the assured, and as absolutely a part of said policy and of the contract of insurance as if it were actually incorporated therein in full."

"Art. 13. Unless the applicant for insurance shall make a true representation of the property on which he requests insurance, so far as concerns the risk and value thereof, the policy issued thereon shall be void; and in case the application is made through an agent, the applicant shall be held liable for the representation."

“Art. 18. In case any other policy of insurance has been or shall be issued, covering the whole or any portion of the property insured by this company in any policy, the policy issued by this company shall be deemed and become void, though such other policy shall be void also, unless the directors shall have been notified of such other policy and given their consent thereto in writing, signed by the president and secretary; and in case of loss or damage of property upon which such double insurance subsists, this company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon; such amount not to exceed two thirds of the actual value of the property at the time of the loss.”

The application contained numerous printed questions and written answers, among which were these: 4. What is the distance and direction from each other, and from other buildings within one hundred and fifty feet, and for what purposes are said buildings occupied? Answer. “See diagram sent you by E. S. Fox, agent, dated 17th November, 1853.” “Make a ground plan on the back of the application.” Answer. “Please attach the one sent as above.” 5. Are there any stores, hotels, mechanics’ shops, or hazardous property of any description in the vicinity, beyond one hundred and fifty feet, so situated as to endanger the property to be insured? If so, state what, and make a plan thereof, with the intervening property, giving all the distances and directions.” Answer. “Is not.” 10. If there is any insurance on the property, state where, to what amount, and at what rate.” The answer to this question gave \$9,000 in other offices, with the rates, and added, “\$8,000 wanted in other companies.” Above the applicant’s signature were printed these provisions: “And the applicant covenants and agrees with said company that the foregoing is a correct description of the property requested to be insured, so far as regards the condition, situation, value, and risk on the same; that neither the building described nor any other within one hundred and fifty feet is used for more hazardous purposes than is herein stated; that the sums proposed to be insured do not exceed two thirds of the actual value thereof exclusive of land;” “that the company shall not be held liable to pay in case of loss more than such proportional part of the value at the time of the loss;” “that he holds him-

self bound by the act of incorporation and by-laws of said company ;” and “ that the misrepresentation or suppression of material facts shall destroy his claim for damage or loss.”

At the trial in Essex, at November term, 1858, before Dewey, J., it appeared that the seminary building was a large structure of the value of about \$24,000, erected in the year 1853, and was totally destroyed by fire on the 30th of June, 1854, within the term of the policy.

The diagram mentioned in the answer to the fourth interrogatory in the application omitted a structure within fifty feet of the property insured, nearer than any other building disclosed, which was forty-five feet long by from twelve to eighteen feet high, made of rough lumber, and was erected before the commencement of the building insured, for the use of the carpenters employed thereon, and was not occupied when the insurance was effected, though carpenter's work was afterwards done in it.

The plaintiffs contended that this was “ a structure of a temporary character only, for the use of the mechanics and those engaged upon the building, which was to be removed upon the completion of the work, and not necessary to be described in the application, although in point of fact it had not been removed when the fire occurred.” The defendants insisted that the omission to disclose this building or structure in the application avoided the policy, whether it affected the risk or not.

The presiding judge instructed the jury “ that if there was upon the premises of the plaintiff, and within fifty feet of the building insured, a carpenter's shop, adapted and used for that purpose, which shop was shown to belong to a more hazardous class, and one which would have required a greater premium to be paid for insuring the seminary building ; and the existence of said shop was not disclosed to the insurers in the answers in the application, but wholly omitted therefrom ; such omission would render the policy void.” And, upon the defendants' prayer for a further instruction, not confined to a carpenter's shop, the court further instructed the jury, “ that if any structure of the size which the evidence tended to show the present was, was shown to have existed on the premises, and within fifty feet of the seminary building, which structure, from the materials usually deposited, and the use to which it was devoted, was such as would thereby have required a larger premium to be paid for insuring

the building by the plaintiffs, if its existence had been disclosed to the defendants in the answers to the questions propounded to the plaintiffs in the application, its omission would render the policy void." The court gave no further instructions on this point.

The diagram mentioned in the application was attached to a letter dated November 17, 1853, written to the defendants by Fox, their agent for receiving and forwarding applications and receiving and delivering policies in return, and contained statements as to the nature of this risk, and the rates of insurance by other companies. The plaintiffs claimed the right to put this letter into the case, and to read and comment upon it to the jury. And the presiding judge, against the defendants' objection, admitted the letter, "instructing the jury that it was to be taken as a letter containing representations by the plaintiffs only, not as proofs of the facts therein stated."

It appeared that at the time of the fire the plaintiffs had \$11,000 insurance, other than the defendants' policy, on the property. The defendants contended that their liability under their eighteenth by-law was to be calculated as if the other insurance had been \$17,000, as mentioned in the policy, and should be therefore limited to three twentieths of the amount insured, such amount not to exceed two thirds of the actual value of the property. But the judge instructed the jury that the defendants' liability was to be calculated by the amount actually insured by the plaintiffs upon their property; and as that amount was less than two thirds of the value of the property, that the defendants were liable, if at all, for the whole amount of their policy. The jury returned a verdict for the plaintiff for the full amount, and the defendants alleged exceptions.

BIGELOW, J. 1. The application for insurance in the present case, the policy issued thereon, and the by-laws of the company, are substantially the same as those which came under the consideration of the court in *Elliott v. Hamilton Mutual Ins. Co.* 13 Gray, 139.¹ It was there held, that the answers to the interrogatories proposed to the assured did not amount to strict warranties; that they were to be construed in connection with the agreements and stipulations made by the assured in the last clause of the application. It follows that, notwithstanding the terms of

¹ *Ante*, p. 383.

the sixth article of the by-laws, the policy is not avoided by an omission to disclose the fact that buildings were situated nearer to the premises insured than the distance named in the answers, unless the existence of such buildings was material to the risk. The instructions given to the jury on this part of the case were in conformity with this construction of the contract, and were sufficiently favorable to the defendants.

2. The letter from the agent, to which the diagram was attached, was properly admitted in evidence under the limitations stated by the court. It was, in fact, a part of the evidence on which the defendants relied. They could not maintain their defence without putting in the application for insurance and the diagram of the premises referred to therein. The latter could be identified only by the date of the letter to which it was attached and the signature of the agent thereto. The defendants could not properly be permitted to put in one part of a document and withhold the residue. The plaintiffs had a right to insist that the whole of it should be read to the jury. Besides, we are unable to see that the letter could in any way have prejudiced the defendants' case. It was not admitted as evidence of the facts stated in it, and the representations which it contained did not relate particularly to any ground of defence relied on at the trial.

3. The ruling as to the amount which the plaintiff was entitled to recover was also correct. Taking the application and the policy together, we think it very clear that there was no intention on the part of the assured to stipulate for obtaining an additional insurance of eight thousand dollars on the property, and that it was not so understood by the defendants. The clause in the policy that eight thousand dollars was to be insured at other offices was inserted for a different purpose. In the application the plaintiffs had stated that they wanted to procure insurance for eight thousand dollars in other offices. By the eighteenth article of the by-laws attached to the policy, it is provided that the contract of insurance shall be void, if other insurance on the property shall be obtained without the consent in writing of the defendants. The object therefore of the clause in the policy relating to future insurance was permissive only, inserted in order that the plaintiffs might procure the further insurance on the property, which in the application they had stated they wished

Gunpowder.

to obtain, without the risk of thereby avoiding the policy or of being under the necessity of applying for the written assent of the defendants. But it was not intended as an agreement that the plaintiffs should at all events procure that amount of insurance on the property, nor to limit the liability of the defendants in case of loss, so that the plaintiffs could recover only a portion of the sum insured by the policy, calculated on the basis that such future insurance actually subsisted on the property. We are therefore of opinion that the plaintiffs were entitled to a verdict for the full sum insured by the defendants.

Judgment on the verdict.

HOUGH vs. CITY FIRE INSURANCE CO.¹ (Supreme Court, Connecticut, February Term, 1860.) *Ownership. — Absolute Interest. — Evidence. — Occupation of Building.*

A person may describe property as "his" when he has a right to it, and the power by law to enforce and protect that right. In legal acceptance, property is *his*, who, in case of its destruction, must sustain the loss.

Where the condition of a policy required "the interest" of the assured to be stated if not absolute, *held*, that this did not mean that he must state the nature of his *title*, if less than absolute. The terms "interest" and "title" are not synonymous. A mortgagor in possession, and a purchaser holding a deed defectively executed, have *absolute* as well as insurable *interests*, though neither of them has the legal title. Sandford, J., *Warner v. Middlesex Assur. Co.*, *ante*, vol. 3, distinguished; see, also, *Treadway v. Hamilton Ins. Co.* 29 Conn. 68.

Evidence *held* admissible to show that the exact nature of the plaintiff's title was explained to the company's agent at the time of the negotiations for insurance.

When no time for the performance of a contract, other than the payment of money, is specified, the law allows a reasonable time. And, therefore, even if the statement in the application that the house was unoccupied, but was "to be occupied by a tenant," was to be regarded as a binding undertaking (which it was not), the law would allow a reasonable time for performance; and what this was, was properly left to the jury.

JAMES McEWAN *et al.*, appellants, vs. RICHARD GUTHRIDGE, respondent.² (Privy Council, February, 1860.) *Gunpowder.*

Among the conditions contained in a fire policy, it was provided that the policy was to be void if at any time there was more than 56 pounds weight of gunpowder on the insured premises, unless specially provided for in the policy. The insured premises were used for general trade, and the assured sold, among other things, gunpowder, but no special insurance was made for the assured having more than 56 pounds weight of gunpowder on the premises. *Held*, that the condition, limiting the amount of gunpowder, was not unreasonable, and was not discharged by the specification of stock in trade (including hazardous) in the policy.

¹ 29 Conn. 10.

² 13 Moore P. C. 304.

Written Words. — Waiver of Printed Condition. — Other Insurance, etc.

JESSE W. BENEDICT vs. OCEAN INSURANCE Co.¹

(Court of Common Pleas, New York, February, 1860.)

Written Words. — Waiver of Printed Condition. — Other Insurance. — Acts of Agent.

The words "privilege for \$4,500 additional insurance" were written in the body of a policy of insurance. *Held*, to work a waiver of a subsequent printed condition in the policy requiring notice to be given to the insurers of any other insurance (within the sum specified), and to have the same indorsed on the policy.

The true intent and meaning is, that the insured may obtain further insurance without notice to the company, and without affecting their policy or their liability upon it, provided such additional insurance does not exceed \$4,500.

Where it is shown that the company prepared the policy of insurance after a careful examination of the insured premises by their own surveyor, and with a full knowledge of the nature of the risk, *held*, that any misdescription of the policy was the fault of the company, and the insured should not be called upon to bear the consequences.

A cellar is not one of the "stories" of a building.

Although, at the trial, evidence of certain admissions of defendant's agent may have been improperly admitted, yet where it worked no injury to the defendant, the action being abundantly sustained without it, *held*, that, on appeal, it will be rejected as immaterial matter, and the objection and exception to its admission may be disregarded.

APPEAL by defendants from a judgment entered against them at special term in favor of the plaintiff.

This was an action brought by the plaintiff, as assignee of August Janson, to recover the loss by fire of certain property insured by the defendant.

The policy was dated the 13th of November, 1857, and for \$70 premium insured Janson against loss or damage by fire to \$2,000, — \$1,800 on his stock, as a cabinet-maker, and \$200 on tools and benches, contained in the five-story brick building, with tin roof, in the rear of 195 and 197 Chrystie Street, New York. On the night of the 21st of January, 1858, the buildings were totally destroyed by fire. The loss was \$9,170.84, of which \$7,612.84 was on the stock, and \$1,558 on the tools. The policy contains this clause, specially written upon the face of the policy, at the time the policy was insured: "Privilege for \$4,500 additional insurance." There was exactly this amount of additional insurance, namely: \$2,000 in the Hamilton Fire Insurance Company; \$2,000 in the New York and Erie Insurance Company; \$500 in the Tradesmen's Insurance Company. In the body of the policy the following provision was printed: "And provided further, that in case the assured shall have already made any other insurance against loss by fire on the property hereby insured, not notified

¹ 1 Daly, 8.

to this corporation, mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And if said insured, or his assigns, shall hereafter make any other insurance upon the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect."

The cause was tried before Judge Daly and a jury, on the 16th and 17th of December, 1858, and a verdict rendered for the plaintiff for \$2,095.67.

By the Court, HILTON, J. (*orally*). 1. We do not perceive how any effect can be given to the words written by the defendants in the body of the policy, except by construing them as a waiver of the condition requiring notice to be given to the company of any other insurance (within the sum specified), and to have the same indorsed upon the policy. To say that it extended only to waiving notice of the insurance, and not to the condition requiring the indorsement, it seems to us would be giving a strained and unnatural construction to the sentence, and such a one as the parties never contemplated.

We think its true meaning and intent to be that the insured might obtain further insurance without notice to the company, and without affecting their policy or their liability upon it, provided such additional insurance did not exceed \$4,500.

2. In connection with the fact that the company made out the policy, it appears that their surveyor had previously examined the premises throughout, and knew their character. If, therefore, there was any misdescription in the policy, it was their fault, and the insured should not be called upon to bear the consequences.

But there was no misdescription. The building was a five-story one, bearing that number of floors above the sidewalk, and it was so described in the policy. But assuming that there was a misdescription, we think it would be a gross act of injustice to permit a company who, it is shown, prepared the policy of insurance after a careful examination of the insured premises by their own surveyor, and with a full knowledge of the nature of the risk, to avail itself of such an error of its own, by which the policy might be avoided.

3. The admissions of Wilcox may have been improperly admitted in evidence, and we rather incline to the opinion that they

Thefts. — Preliminary Proofs. — Experts.

were ; but they worked no injury to the defendants, as the action was abundantly sustained without them. Rejecting them, therefore, as immaterial matter, in no way affecting the conclusion arrived at, it follows that the objection and exception to their admission may be disregarded. *Judgment affirmed.*

BOGGS & LEATHE, respondents, vs. AMERICAN INSURANCE CO.¹
 (Supreme Court, Missouri, March Term, 1860.) *Misrepresentation.*
— Concealment.

A material fact is one which if communicated to the underwriter would induce him either to decline an insurance altogether or not to accept it unless at a higher premium.

The rule in marine insurance that any circumstance evidently and materially enhancing the risk must be disclosed by the applicant for insurance, though no inquiry is made respecting it, is in fire insurance to be taken with the qualification that such circumstances were known to the applicant at the time of insuring, and not known or presumed to be known to the insurer, and of which he is not bound to inform himself or take the risk of it, and that there is no concealment.

Statements made to the insurers on previous occasions not made in an application for insurance, and not in connection with the present insurance, *held* inadmissible to rebut the evidence of a fraudulent concealment.

NEWMARK, appellant, vs. THE LIVERPOOL AND LONDON FIRE AND LIFE INSURANCE CO., respondent.²

(Supreme Court, Missouri, March Term, 1860.)

Thefts. — Preliminary Proofs. — Experts.

The defendants *held* liable for losses by theft after the extinguishment of the fire.

The affidavits concerning the loss are not evidence of the amount of loss.

The testimony of experts in insurance is admissible only as to matters of skill and science of which the jury cannot well judge.

THIS was an action for the loss of a stock of goods by fire. The third instruction of the judge at the trial was that the plaintiff was entitled to recover for goods that were lost at the time of the fire, but not for any goods that were stolen before the fire, or that may have been stolen after the fire happened and was extinguished. The fourth instruction was, that if the plaintiff had claimed in his affidavit of loss a larger amount than he had actually sustained, with intent to defraud the defendants, he could not recover. The fifth instruction was, that the plaintiff's books of account were not evidence unless proved by the parties making the entries therein, or by some one who had examined or knew the same at the time they were made to be correct and

¹ 30 Mo. 63.

² 30 Mo. 160.

true ; and the plaintiff's own entries were not evidence except so far as they were shown by other evidence to be correct. The sixth instruction was, that the affidavits of loss were evidence only of the fact that no proofs of loss had been produced to the defendants by plaintiff.

NAPTON, J., delivered the opinion of the court.

We consider the third instruction, which was given in this case for the defendant, as objectionable. The rule in relation to stolen goods has been sufficiently explained to the jury in the first instruction given for the plaintiff, and the restriction of the liability of the company for thefts to the precise period when the fire was extinguished is not in accordance with the principle upon which such liability is based. That principle is alluded to in the instruction first given on this subject ; the precise time when a theft occurs is not important, if it be occasioned directly by the fire. Such an instruction may have a tendency to mislead, especially as there was no evidence of any thefts having been committed before the fire happened or after it was extinguished.

The propriety of the fourth instruction given for the defendants is not material, since the jury found for the plaintiff upon the facts submitted to the jury on that instruction. But as the answer did not set up any forfeiture of the policy by reason of false or fraudulent affidavits in the preliminary proofs, the instruction was upon an issue not made by the pleadings and calculated to prejudice the plaintiff's claim.

The fifth instruction given for the defendants seems to have been designed to convey a proper caution to the jury in relation to the character and effect of the plaintiff's books of accounts as evidence. The phraseology of the instruction is perhaps awkward, if not ambiguous, and is objected to as leaving to the jury the question of the competency of this part of the plaintiff's evidence. If liable to this interpretation, the instruction would undoubtedly be objectionable ; but we suppose it was simply intended to apprise the jury that the books were not evidence of themselves, as they have been and are considered in some courts, but that they should be regarded as entitled to no further weight than the proof of the witnesses who were examined in relation to their accuracy would justify.

The sixth instruction was, in our opinion, correct. The affi-

davits and accounts of loss, constituting the preliminary proofs, are evidence that the plaintiff has complied with the requirements of the policy in this respect, but they are no evidence in his favor upon the amount of loss. The affidavit required to be appended to every petition might as well be regarded as proof of the truth of its allegations. The contrary decision in *Moore v. Protection Insurance Co.* 29 Maine, 97,¹ seems to have no support in principle or upon authority.

Upon the trial of this case several witnesses were allowed to give their opinions of the amount of goods in value which the plaintiff's store would contain, and especially the value of the goods which could have been packed on the shelves destroyed by the fire. The witnesses were engaged in the same business followed by the plaintiff.

The general rule is, that persons of skill in any particular science or art may give their opinions, "when the subject matter is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science or art as to require a course of previous habit or study in order to attain a knowledge of it." Taylor on Evidence, vol. 2, § 1038. The rule is evidently confined to cases where, from the nature of the subject, facts disconnected from such opinions cannot be so presented to the jury as to enable them to pass upon the question with the requisite knowledge and judgment. There are some exceptions to this rule not necessary to be noticed in connection with the point taken here.

There can be no doubt that the evidence given in this case was of a very loose and unsatisfactory character. The two witnesses first called differed by \$10,000 as to the amount of goods which could be packed in the store; nor did either of them have any knowledge of the store and its contents before the fire. Their opinions seem to have been formed upon a mere inspection of the store after the fire, and an examination of the general character of the stock left. In the case of *Howard v. The City Fire Ins. Co.* 4 Denio, 507,² the witness was a clerk in a store immediately adjoining the one burnt, and proved the dimensions of the two stores to be the same. He also proved that previous to the fire an inventory had been taken of the goods in the store

¹ *Ante*, vol. 2, p. 758.

² *Ib.* p. 539.

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where he acted as clerk, and he was allowed, from the appearance of the two stores as observed by him, to give his opinion of the relative quantity of goods in the two stores. But in the present case, the opinions of the witnesses seem to have been formed without any peculiar advantages of arriving at correct conclusions. If they had confined their statements to facts, it is not seen that the jury could not have drawn as correct conclusions as the witnesses. Their opinions appear to be mere random conjectures.

The other judges concurring, the judgment is reversed and the case remanded.

WALLINGFORD *et al.*, respondents, vs. HOME MUTUAL FIRE AND MARINE INSURANCE Co., appellant.¹

(Supreme Court, Missouri, March Term, 1860.)

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The defendants' charter provided that applicants, before receiving a policy, should "deposit their promissory note . . . a part of which, not exceeding ten per cent., shall be immediately paid." It was further provided by the by-laws that policies should take effect at noon of the day of approval, and should thereafter be binding, provided the premium or ten per cent. thereof was paid, and that the ten per cent. payment should always be made and indorsed on the policy. *Held*, that the giving the premium note and payment of ten per cent. thereof were conditions precedent to the liability of the defendants.

EWING, J., delivered the opinion of the court.

This was an action on a policy of insurance. The respondents were doing business in the city of Weston, Mo., in the firm name of Wallingford & Newman. The appellant was a Mutual Insurance Company, holding a charter from this state, and located and doing business in St. Louis.

By the eighth section of the charter it is declared that every person becoming a member of the company by effecting insurance therein shall, before he receives his policy, deposit his promissory note for such sum as shall be determined by the directors; a part, not exceeding ten per cent., of said note shall be immediately paid for the purpose of discharging incidental expenses, &c.; another provision of the charter provides that insurance shall be made on the written application of the assured. The by-laws make it the duty of the president, alone or jointly with any director, to examine all applications for insurance, fix the sum or

¹ 30 Missouri, 46

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sums to be taken on each, and the rates of insurance, and approve the same by indorsement on the back of the application; also that "policies of insurance shall take effect at twelve o'clock, noon, on the day of approval, at the office of the company, and shall be binding thereafter, *provided the premium or ten per centage on the premium note has been paid.*" Sec. 8, article 4, of the by-laws, further declares that ten per cent. of the premium note shall be paid in all cases and indorsed thereon; one dollar shall be paid to the secretary for each policy, and fifty cents for every assignment or transfer, and one dollar shall be allowed agents for each application taken by them, provided the same is affirmed; and the charter, amendment, by-laws, and conditions of insurance annexed to the policy, and the application for insurance, are all by express terms made a part of the policy, — all which, together with the policy and premium note, were read in evidence on the trial. Besides these, the evidence in the case consisted of the deposition of L. D. Bird, and Salisbury, the secretary of the company. Bird was the local agent of the company at Weston for receiving and forwarding applications for insurance; and to him the respondents made their application for insurance to the amount of twenty-two hundred dollars for six years on the property described in the petition. The application was filled up by Bird at the rate of nine per cent. premium for the six years, and a blank premium note was signed at the same time by respondents and delivered to Bird, who forwarded them to the company at St. Louis. It also appeared from the deposition of Bird that some time after they were sent down, and before the appellant would issue the policy, a resurvey of the property was required, which was made and forwarded; that the application was then acted upon by the president, who approved the risk at the rate of *fifteen per cent.* premium for six years; and on January 20, 1855, a policy was made out, signed, and sent to the agent, Bird, with a letter explaining the reasons for fixing the rate so high, and directing that if the insured should think the rate too high, the agent might return the policy without charge; that the agreement between the respondents and himself (Bird) at the time application was made was that the former should take the policy at any rate fixed by the company, and that the rate nine per cent. was set down by him merely to influence the company to fix it at what he thought was a reasonable and fair rate. The policy

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reached Weston while the agent (Bird) was absent in Nebraska, and on or about March 8, 1855, the property was destroyed by fire. Bird was absent a greater part of the time between the date of the policy and the fire. During this time inquiry was made of him by respondents whether the policy had arrived, but no demand was made for it, and no offer to pay the premium; nor does it appear that the respondents knew before the fire occurred at what rate the premium had been fixed, or that a policy had in fact been made out by the company. It would seem, from the testimony of Bird, that the policy, having been received in his absence, had been mislaid in his office and lost sight of, and that when inquiry was made of him concerning it by the respondents, he was in doubt whether it had been received at all, or whether he had not delivered it to them, but did not suppose it was actually in his possession until he found it after the fire. It appears from the testimony of both Bird and Salisbury that the former had no authority to fix the rates of insurance, or to accept risks, but only to receive and forward applications. It does not appear that the respondents, at the time of the application, offered to pay any portion of the premium, though Bird says he is not certain that they *did not*, but that he had no power to bind the company by receiving it, and did not do so.

Salisbury, the secretary of the company, exhibits and reads a copy of a letter written by him to Bird, dated January 20, 1855, inclosing policy and giving statement of sum due on it at fifteen per cent., and directing that if the respondents should think the rate too high, he could return the policy without charge. The application was received by the company from their agent (Bird) January 3, 1855. He also states that no premium was ever paid to the office; that the only authority that Bird had for delivering said policy to respondents was the letter alluded to. These are the material facts in the case.

The question we propose to consider in reference to the instructions given and refused is whether, under the state of facts proved, there was any acceptance of the terms of insurance on the part of the respondents; in other words, whether there was a mutual assent of the parties or union of minds to the terms, so as to complete a contract of insurance. Was the acceptance of the policy, the giving of the premium note, and the payment of ten per cent., any or all of these, prerequisite to its consumma-

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tion? It is not pretended that the agent had any authority to make a contract of insurance, to agree upon the rate of premium, or to take risks. No question can arise as to the extent of his power as the company's agent; it was confined to that of receiving applications and forwarding them to his principal. The application was filled up for insurance at the rate of nine per cent., and may be considered as an application for insurance at that rate, or an offer on the part of respondents to give that much. It is true this sum was inserted in the application by the agent, Bird; but nothing appears to show that appellant knew anything of the reasons that induced Bird to specify this rate, or that it was not in fact the proposition of the respondents to have insurance effected at that rate. Further information having been obtained respecting the condition and situation of the property, the rate of insurance was fixed at fifteen per cent., and the policy was sent to the agent with instructions that it could not be taken for less; that if the respondents deemed it too high, he (Bird) could return it without charge.

There was here no assent or union of minds to the terms proposed, but one proposition made which was not accepted, and another and different one submitted by the company, which was not accepted or even known to have been made before the fire. The case would not have been different if no rate had been specified in the application (and it was the same thing in effect, for Bird had no authority to agree upon it), and it had been forwarded to the company. It could scarcely be maintained in such case that the company would have been bound before the terms had been submitted to and accepted by the respondents. Here is an application for insurance, and terms are proposed by the company, which the respondents were at liberty to accept or reject at their option. But it was never acted upon before the loss, and could not have been, because they were not informed of it. It does not appear that the company knew, before the fire occurred, that the respondents proposed to hold themselves bound by any rate of insurance that it might fix; and even if Bird had knowledge of this, the company would not be bound by it.

Although the policy may have reached Bird and been in his possession before the loss happened, it was the same thing as if it had remained in the possession of the company, for it never passed from the agent, and never had been seen or assented to

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by the respondents, and there was no delivery of it to them. It was a mere proposition which had not been submitted to, much less assented to, by the respondents, and no act of theirs could convert it into a contract of insurance after the fire occurred, or give it effect as such.

But there is another reason why this policy never took effect, which is that the ten per cent. on the premium note had not been paid. We have seen that the charter declares that the applicant for insurance "shall, before he receives his policy, deposit his promissory note, &c., a part, not exceeding ten per cent. of which, shall be immediately paid." The by-laws provide that "policies shall take effect at twelve o'clock, noon, on the day of approval at the office of the company, and shall be binding thereafter, *provided* the premium or the ten per cent. tax on the premium note has been paid," and "that ten per cent. of the premium note shall be paid in all cases and indorsed on the policy." The evident meaning of this clause of the charter is, that the giving of the note and paying the prescribed per cent. are conditions precedent to the taking effect of the policy, and it is so interpreted and carried out in the by-laws which have been quoted; and any by-law which had not exacted these terms would have been inconsistent with and unauthorized by the charter. The policy, it is true, was approved on the 20th of January, and would have been binding from noon of that day if the contract of insurance had been perfected and the money paid; but having been approved without the assent of the respondents to its terms and the payment of the required sum, the policy was incomplete as a contract of insurance, and remained so by reason of the non-assent of the respondents.

Mr. Phillips, in his work on Insurance, says the execution of a contract of insurance is not distinguishable from that of other written instruments; that though a policy is a contract between two parties, each of whom is under certain obligations and entitled to demand of the other a compliance with certain implied and expressed conditions and stipulations, it is subscribed only by the insurer himself or by his agent or attorney, and when so subscribed and actually or constructively delivered *unconditionally* to the assured, it is a complete and binding contract; and the general rule and usage applicable to contracts of insurance (irrespective of any special regulations by charter or by-laws),

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according to the same author, is, that in the usual form of the policy the insurer on a marine risk acknowledges payment of the premium, and on fire or life policies of the whole or first annual premium or deposit, or first instalment, and accordingly always imports a settlement, by cash or premium note, or a part of the whole of the premium, simultaneously with the execution and delivery of the policy. This is equivalent to saying that the contract is not in force until such payment has been made. As the company derives its existence and powers from the charter, of course the charter is the law of its being and rule of conduct in the administration of its affairs ; and to this, and the by-laws enacted pursuant to it, the company must be restricted in the transaction of its business.

In contracting with such a body it is necessary not only to see that the contract is one within its authority to make and that the person acting as the agent of the company is authorized to bind it, but also that the contract is in the form by which the company, according to its constitution, may be bound. 1 Phillips, § 11.

A number of cases have been cited by the respondents' counsel all of which, we think, are distinguishable from the case before us. In *Blanchard et al. v. Waite*, 28 Maine, 51, the suit was assumpsit on a contract of insurance against a member of a voluntary association of underwriters, for whom the secretary was authorized by a general power of attorney to use the names of all the associates in signing policies of insurance. One of the plaintiffs applied to the president for an insurance on a vessel, of which they (plaintiffs) were sole owners, who, after consultation with the director for the week, agreed to take the risk, and the plaintiff applying signed the terms on the proposition book. Nothing was said about a premium note, which, under the articles of the association, the secretary was at liberty to take on such time as the directors might determine. When the proposition book was signed, the applicant was informed the insurance was complete. It was shown that, according to the prevailing custom there, the insurance offices kept proposition books where applicants sign the same, and then leave the office considering themselves insured, the contract being regarded as finished at the time of signing the book. It was under this state of facts that it was held that neither the giving the premium note nor the re-

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ception of the policy by the insured were prerequisites to the consummation of the contract of insurance, but that it was completed when there was an assent to the terms of it by the parties upon a valuable consideration.

In *Tayloe v. Merchants' Insurance Co.* 9 How. 891,¹ one question was whether (where there was a correspondence relating to insurance of a house against fire) the company, having made known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms. In the instructions of the company to their agent at a distant place, he was advised to transmit all applications for insurance to the office for consideration, and that upon receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate acceptance to the company; and the policy to be thereafter issued is to bear date from time of the acceptance. The court held that in accordance with the usage of the companies, as well as upon general principles of law governing contracts entered into by absent parties, the contract was complete when the assured placed a letter in the post-office accepting the terms. The claim was also resisted by reason of the non-payment of the premium note, the actual payment of which, according to the condition annexed to the policy, was necessary to make the insurance binding. The agent was instructed to give no credit for premiums, but no mode of payment had been prescribed by the company, and the agent was at liberty to use a discretion in the matter, and he accordingly directed the insured to pay it in a check payable to his order. The agent, on communicating to the insured the terms received from the company, said to him that if he desired to effect the insurance he could send to the agent his check "and the business would be concluded." The transmission of the check by mail was held a payment of the premium within the terms of the policy, and that in judgment of law it was actually paid at the time the contract became complete.

In the case in 20 Ohio, 527, cited by counsel, the contract of insurance was made with an agent who, it appears, was fully authorized to make a valid contract without the ratification of the company. The case in 4 Cowen, 145, involved the question of the authority or powers of the agent to bind the company in

¹ *Ante*, vol. 3, p. 94.

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the given case, and is unlike the case at bar in its leading facts. The remaining cases cited, we think, are also inapplicable.

In the view we have taken of the case, we are of opinion that the instructions given at the instance of the respondents, and by the court on its own motion, were erroneous, and that those asked by the appellant should have been given.

We see no error in excluding or admitting evidence. Judgment reversed; the other judges concurring.

HAWKES vs. DODGE CO. MUTUAL INSURANCE CO.¹ (Supreme Court, Wisconsin, March, 1860.) *Lease.—Tenantless House.*

It is no defence to an action upon a fire policy that the insured has leased the premises and part of the time left them tenantless: unless these acts are forbidden by the policy.

NOTE. — *Sed quere.* The true question in such cases is, has there been such an increase of the risk as was not within the contemplation of the parties at the time the policy was effected. There are thus two questions: 1. Was there an increase of risk? 2. Was the increase in the contemplation of the parties? The latter will generally be a question of law. The former will generally be a question of fact. As to the above case, it doubtless was in the contemplation of the parties that the premises might be leased (for such acts are usual), and therefore that it might sometimes be vacant. But it could not have been intended that it

should be left permanently vacant, unless means were taken to protect it. How long it was vacant, and whether it was protected in any way, and to what extent, in case it had stood vacant for a long time, were facts for the jury. These were facts concerning the risk; and the risk cannot be increased (except in temporary ways, contemplated by the parties) without avoiding the policy; it is therefore apprehended that the court were wrong in deciding as matter of law that leaving the house vacant did not affect the contract. The question could only be answered upon the finding of facts such as we have indicated.

HOWARD FIRE AND MARINE INSURANCE CO. vs. SAMUEL H. CORNICK *et al.*²

(Supreme Court, Illinois, April Term, 1860.)

Misrepresentation.

A false statement of something outside, and independent of the property insured, will not avoid a fire policy.

WALKER, J. It is urged that there was a breach of warranty by the assured, because a portion of the representations regarding the occupancy of the building which contained the goods was untrue. By the policy, the application, the survey and conditions annexed, are made a part of the contract, and it is justly conceded that, in so far as they relate to the goods insured, they must be

¹ 11 Wisc. 188.

² 24 Ill. 455.

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true, or the policy will be void. In this case, however, it is not claimed that any part of the description or representation of the goods covered by the policy is untrue. The false representations relate alone to the building in which they were contained, and to its occupancy. The building was not insured by this policy, and the question is presented whether a false representation of something outside, and independent of the property insured, can affect the validity of the contract, when the misrepresentation has not contributed in any degree to the loss. This depends on the construction to be given to the conditions annexed to that instrument.

The first, second, and third of these conditions manifestly relate alone to the insurance of buildings. The fourth, with the exception of the last clause, relates to the insurance of goods, wares, and merchandise, and only requires a description of the building which contains them, but contains no requirement as to its occupancy. It seems to us, that by no fair construction can it be held that this clause, containing the conditions of the insurance of chattels, was designed to require anything more than a true description of the building in which the property insured is situated, with a description of the property covered by the policy; and we can perceive no reason for extending the terms of the warranty beyond what they were evidently designed by the parties to embrace. The body of the policy also declares the insurance to be "on the following property, as described in the application and survey number fourteen, which is hereby declared a part of this policy and a warranty on the part of the assured." What was a part of the policy and a warranty? Why, the description of the property insured. The relative in that sentence obviously refers to the description of the property insured, and that description is warranted to be true, and it is not pretended that the description of that property is otherwise than strictly true. If this warranty, then, only engages for the truth of that description, it cannot be broken by a misdescription of something outside of the warranty. Under this warranty, the assured had only engaged for the truth of the description and representations of the property insured, and the warranty has been performed. We are fully sustained in these views by the following adjudged cases: *Sales v. Northwestern Ins. Co.* 2 Curtis C. C. R. 610; *Kentucky & Louisville Ins. Co. v. Southar*, 8 B. Mon. 634; ¹ *Farmers' Ins.*

¹ *Ante*, vol. 2, p. 765.

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Co. v. Snyder, 16 Wend. 481;¹ *Trench v. The Chenango Mut. Ins. Co.* 7 Hill, 122;² *Howard Fire Ins. Co. v. Bruner*, 23 Penn. (11 Harris) 50; *Roth v. The City Mut. Ins. Co.* 6 McLean, 324; *Masters v. Madison County Ins. Co.* 11 Barb. 624.

In the case of *Trench v. The Chenango Ins. Co.*, which was a policy on both the building and goods, and the representations of the building were proved to be untrue, the court, under similar conditions in the policy, held it to be void as to the building, but valid on the goods. The Pennsylvania case referred to (*Howard Ins. Co. v. Bruner*) holds, that when the survey is made by the agent of the company, and a mistake occurs in the application, the insured is not bound by it, but may show by parol the knowledge of the fact by the agent. And in the case of *Masters v. The Madison County Ins. Co.* it was held that a verbal notice of a mortgage against the property, given to the agent, was sufficient, notwithstanding the policy required it to be in writing.

If the loss had been occasioned by the thing falsely, although unnecessarily represented, or from its concealment when interrogated as to its existence, then that fact might be shown, for the purpose of establishing a fraud on the company, and would be a matter proper for the consideration of a jury, but no such question is presented by the record. On the contrary, it appears, from the evidence, that the agent who made this survey had made a survey of this building a few days previously, and was then fully informed of its situation and occupancy. And the evidence fails to show that any change had taken place subsequent to that time. This seems to rebut all evidence of concealment, but even if there had been, there is no pretence that it contributed in the slightest degree to the loss, or was in any way material. Good faith is essential in the contract of assurance, and we see nothing to induce us to believe it has not been observed in this case. There was no evidence showing that the misrepresentations misled the company in taking the risk, or that they were induced to accept it at a lower premium, and as their agent knew all the facts, it could not have misled them in granting the policy. The evidence of Bunker, while it may not have been material to the issue, tended to show good faith on the part of the assured, and was not calculated in any manner to prejudice the appellants in their rights, and its admission was not such an error as should reverse the judgment.

¹ *Ante*, vol. 1, p. 594.

² *Ante*, vol. 2, p. 384.

Misrepresentation.

It is likewise objected that the court erred in modifying the instructions asked by, and given for, the appellants. The modification complained of authorized the jury to determine whether the company had done any act which estopped them from insisting upon the false representations contained in the application, without having, by any of the instructions, informed them what acts would have that effect. We have no hesitation in saying, that had the instructions asked been proper, then the qualifications would have been erroneous, unless they had also announced what would create an estoppel. But all the instructions, basing the defence upon the want of accuracy in the description of the manner in which the house was occupied, were unwarranted by the evidence, and should have been refused, as we have seen the truth of these representations were not in issue. The modifications could not have misled the jury, to the injury of plaintiffs in error. They operated in their favor, as the jury was informed that these false representations constituted a defence, unless the company had done some act which estopped them from its assertion. There was no error in giving these instructions as modified of which the plaintiffs in error have any right to complain.

It is likewise urged, that the judgment should have been arrested, for the want of an averment in the declaration that the company had failed to replace the property destroyed. They had reserved the right to pay or discharge their liability in this mode, or by paying the money in case of loss. If this right related to the loss of chattels, they should have shown it by way of defence, but no such effort was made. The averment that the money had not been paid, or any part of it, though not formal, and though not sufficient on demurrer, is, we think, aided after verdict, as the plaintiffs could not recover until they showed the loss of the property, and a breach of the covenants by the defendant.

Upon the whole of this record we perceive no error requiring a reversal of the judgment of the court below, and it appears to us that substantial justice has been done, and that the judgment must be affirmed.

Judgment affirmed.

CABALLERO & BASUALDO, for use, etc., vs. HOME INSURANCE CO.¹

(Supreme Court, Louisiana, April, 1860.)

Proximate Cause. — Loss by Explosion not Fire.

It is the proximate, and not the remote cause of the loss, which is to be regarded in order to ascertain whether the loss is covered by a policy of insurance.

Where a fire occurs upon the premises insured, by which an explosion of gunpowder takes place, the insurer is responsible for the loss which is the direct consequence of the combustion.

Where the fire did not happen at the premises insured, but broke out in a building about two hundred feet distant, causing the explosion of gunpowder, which by the concussion of the air injured the building insured against fire, *held*, that such a loss could not have been within the reasonable intendment of the parties, and was not covered by the policy.

APPEAL from the fifth district court, of New Orleans.

MERRICK, C. J. The defendant covenanted in a fire policy to make good to the plaintiffs all such loss or damage as should happen by fire to a two-story brick slated store on Elizabeth Street, in Brownsville, Texas, during the period of one year.

A fire broke out in a building about one hundred and eighty or two hundred feet distant, which contained a quantity of gunpowder. In about thirty minutes the gunpowder exploded. The explosion of the gunpowder produced such a concussion of the air and earth as to crack the walls of the building and brick arches, drive in the windows and blinds, loosen the plastering and slates, and in fine injure the building to the amount of nine hundred and fifty dollars.

The fire continued in Brownsville for forty-eight hours, but did not reach the building in question, the same being entirely unharmed, except from said concussion.

The case, therefore, presents one of those difficult questions to solve, arising from the maxim that it is the proximate and not the remote cause of the loss, which is to be regarded, in order to ascertain whether the loss is covered by the policy.

It seems to be well settled, that where a fire occurs upon the premises insured, by which an explosion of gunpowder takes place, the insurer is responsible, on the ground that the loss is the direct consequence of the combustion. See *Scripture v. Lowell Mutual Ins. Co.* 10 Cush. 356; ² 11 Peters, 225; Parsons Mercantile Law, 527.

¹ 15 Louisiana An. 217.² *Ante*, vol. 3, p. 429.

Proximate Cause. — Loss by Explosion not Fire.

So where a building has been blown up, or goods injured by water, in order to prevent the spread of the conflagration, the insured is held responsible if they would otherwise have been destroyed by the fire.

So, too, where the policy compels the assured to labor for the protection of the goods, and they are injured or stolen in their removal to avoid the fire. 1 Bouvier Inst. 503.

But these cases are not entirely analogous. For in each case the property was in the immediate danger of the fire, and would have been lost had not means been taken to arrest the flames, or avoid their effects.

In the case at bar the store was not in any danger from the fire, and the instant the concussion of the air took place all danger was over.

If now the question were asked any one unacquainted with the law of insurance, whether an injury could be considered as occasioned by fire, where it had only been effected by the air put in motion by an explosion of gunpowder and the fire itself had not touched the building? We think the answer would be, No; because the insurance company only bound itself to answer for damage done by the element of fire, and not for an injury done by any other element.

But it is replied by the jurist, that the law looks upon the question in a different light. It seeks for the first efficient cause of the loss, and that is the *causa proxima*, however many other agencies may have intervened.

Here there would have been no concussion of air, without the explosion of gunpowder, and the gunpowder would not have exploded without taking fire and producing instantaneous combustion by which gases were evolved and expanded which set the air in motion.

But the question might be put, was the policy really intended to cover a loss by this sort of combustion which does not consume the building, and leaves scarcely a trace of the element of fire, and produces its effect by the action of gaseous matter and the agency of another element, viz., that of air?

If so, would not an accident like that which happened in Delaware some years since render the fire insurance companies liable?

There a dray load of gunpowder, from some unknown cause,

Alterations. — Hazardous Trade.

perhaps the cigar of the drayman, exploded in the street or highway, producing a prodigious concussion of the air, and doing great injury to the buildings in the neighborhood. Would this be a loss within any policy of fire insurance?

Suppose a loaded cannon should accidentally ignite and explode in the neighborhood of buildings, and do injury both by a concussion of the air and the fragments which were hurled from it; would the insurance company be responsible? For here again is combustion by fire as in the other cases of explosion of gunpowder.

These examples show how difficult it is to make a satisfactory application of the best rules which courts of justice have been able to devise on the subject of insurance.

Perhaps, after all, it might be safe here, as in other contracts, to inquire whether the loss was within the reasonable intentment of the parties when they made the contract. Did they intend, by an insurance against fire, to cover losses arising from the concussion of the air produced by the explosion of gunpowder on the premises of other persons than the insured?

We think such an extraordinary result could not have been contemplated by the parties. We do not think insurance companies can be considered responsible for the consequences of the combustion of gunpowder, unless that combustion has happened in the premises insured, or the gunpowder is itself, with other merchandise, covered by the policy.

Judgment reversed, and rendered in favor of defendant, with costs of both courts.

LADD and BUCHANAN, JJ. dissented.

See *Austin v. Drewe*, ante, vol. 1, p. 106, and note.

HOWELL'S EX'RS vs. BALTIMORE EQUITABLE SOCIETY.¹ (Court of Appeals, Maryland, June Term, 1860.) *Alterations. — Hazardous Trade.*

It may be true, as a general rule, that when a loss has happened from the perils covered by a fire policy, and the insurer claims exemption under the clause of the policy against unauthorized alterations, increasing the risk, and providing that any loss, *happening by reason of such alterations*, shall not be paid, the *onus* is on him to prove the facts which entitle him to the exemption.

But where there is a total destruction of the building by fire, and the claim is for the whole loss, and it is shown to have resulted either altogether, or to an unknown extent, from an unauthorized alteration which increased the risk, the loss must fall on the

¹ 16 Md. 377.

By-laws. — Notice of Loss.

ured, unless he furnishes proof of some loss occasioned by other causes than such alteration.

Under the clause of a fire policy making it void if any unauthorized hazardous trade, increasing the risk, is carried on in the building, the fact that such trade was carried on avoids the policy, no matter what was the cause or origin of the fire, or that such trade was carried on by the tenant of the assured without his knowledge or consent.

CLARK vs. UNION MUTUAL FIRE INSURANCE Co.¹ (Supreme Court, New Hampshire, June Term, 1860.) *Jury. — By-laws. — Surveyor.*

Whether there has been a misrepresentation or concealment on the part of a person procuring insurance upon his property, in relation to facts material to the risk, is proper matter of inquiry for the jury, as for them to determine.

Although the by-laws of an insurance company provide that the person taking the survey of the property shall be the agent of the applicant, yet such person is still considered the agent of the company also, and as such the company are bound by his acts.

PATTEN vs. MERCHANTS' AND FARMERS' MUTUAL FIRE INSURANCE Co.² (Supreme Court, New Hampshire, June Term, 1860.) *Misrepresentation.*

A misrepresentation in regard to a material fact, made by the plaintiff in his application for insurance in the defendant company, where such statement does not amount to an express warranty, and was made without fraud on the part of the applicant, will not avoid the policy if the defendant company, at the time the application was made, had knowledge of the real existence and true situation of the facts concerning which the misrepresentation was made.

A principal is to be charged with a knowledge of all facts known to his agent.

DODGE CO. MUTUAL INSURANCE CO. vs. ROGERS.³ (Supreme Court, Wisconsin, June Term, 1860.) *Increase of Risk. — Unanswered Question.*

The defendants requested the judge to instruct the jury that every increase of the risk within the control of the assured rendered the policy void. *Held*, that the request should have been granted, especially as the policy contained a provision to that effect.

An application (filled by the insurers' agent) being accepted with one of the questions unanswered is a waiver of the right to have it answered; but it will be for the jury to say whether a hazardous business has subsequently been carried on in the building insured, which is covered by that question, provided the agent did not know of the intention to so use the building when he filled out the application.

FRANCIS A. BOYLE vs. N. C. MUTUAL INSURANCE CO.⁴ (Supreme Court, North Carolina, June Term, 1860.) *By-laws. — Notice of Loss.*

Under a charter for mutual insurance against loss by fire, it was *held* that every member of the company is bound by the conditions annexed to the policies through the by-laws.

Where one of the by-laws of a mutual insurance company required that the insured, within

¹ 40 N. H. 333.

³ 12 Wisc. 337.

² 40 N. H. 375.

⁴ 7 Jones (N. Car.), 373.

Notice of Loss "forthwith."

thirty days after loss by fire, should give notice to the company, specifying the amount of loss, the manner of it, and other particulars as a condition to his right to recover, it was *held* that a declaration to the insured by a travelling agent of the company, that "the matter would be all right with the company," was not a waiver of the necessity of such notice.

The case of *Woodfin v. Asheville Mutual Insurance Co.* 6 Jones' Rep. 558, cited and approved.

HENRY P. WHITEHURST *vs.* NORTH CAROLINA MUTUAL INSURANCE CO.¹

(Supreme Court, North Carolina, June Term, 1860.)

Notice of Loss "forthwith."

A requisition in a policy of insurance, that the assured shall *forthwith* give notice of a loss to the company, is not complied with by giving notice at the expiration of twenty days.

ACTION OF COVENANT on a policy of insurance against loss by fire, tried before Saunders, J., at the last spring term of Craven superior court.

The execution of the covenant declared on, and the loss of the building insured by fire, were proved; and the defendants, for their defence, alleged that the plaintiff had not complied with the stipulation contained in the contract, to give the company notice of the destruction of the property; also, a statement of the particulars of the destruction; and they relied on the following clauses in the policy and annexed conditions. In the policy it is provided: "This policy is made and accepted in reference to the conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for."

The condition relied on in their defence, as being annexed to the contract of assurance, is as follows: "10. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the secretary, and within thirty days after said loss, to deliver a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation."

The evidence was, that after the expiration of *twenty* days, the insured furnished the company with the affidavit containing the particular account of the loss, but there was no evidence that any other notice of the loss was given by the insured to the company. His honor held that the notice furnished was a compliance with

¹ 7 Jones (N. Car.), 433.

Intention. — Other Insurance.

the terms of the contract on the part of the plaintiff. Defendant excepted.

Verdict and judgment for plaintiff, and appeal by the defendant.

PEARSON, C. J. We differ from his honor upon the first point made by the defendant. The affidavit, &c., furnished by the plaintiff, and forwarded to the secretary of the company, was not, in the opinion of this court, a *full* compliance with the condition of the policy, which requires "all persons sustaining loss or damage by fire, *forthwith* to give notice thereof to the secretary, and within thirty days after the loss to deliver a particular account of such loss or damage, signed with their own hands, and verified by oath or affirmation," &c. This condition imposes two duties; the latter was complied with, but the former was not, and consequently, the plaintiff was not entitled to recover, according to the decision in *Woodfin v. Asheville Insurance Co.* 6 Jones Rep. 558.

The first, or general notice, is required to be given "*forthwith*," to enable the company, as soon after the loss as practicable, to institute proper inquiry; and the second, or particular notice, within thirty days. It was not proven that any notice was given until after the expiration of some *twenty days*. This, certainly, does not satisfy the word "*forthwith*," which must be construed, considering the purpose for which it is required, to mean *immediately*, or within reasonable time; and, under the circumstances, the rule which has been adopted in regard to bills of exchange, *i. e.* on the same day, if in the same town, or else by the next mail, would seem to furnish a fit analogy. As this point is decisive, we will not enter upon the other, especially as the statement, made up by his honor, and his charge in reference to it, are not so clearly set out as to enable us to see that we understand it. There is error. *Venire de novo*.

Per CURIAM.

Judgment reversed.

GALE vs. BELKNAP COUNTY INSURANCE Co.¹ (Supreme Court, New Hampshire, July Term, 1860.) *Intention. — Other Insurance.*

The mere intention of a party, not manifested by any act or declaration, is not admissible to affect the rights of another person.

Where it is stipulated that a policy shall become void if any subsequent insurance shall be made on the property without consent, the first policy will not be avoided, except by a valid and legal policy effectual and binding on the assurers.

¹ 41 N. H. 170.

Use of Premises.

If then a second policy contain a proviso, that it shall be void if any other insurance exists on the same property without consent of the company, the second policy is inoperative and invalid, by reason of the previous policy, and the earlier policy is not affected by it.

NICHOLAS G. HOXSIE *vs.* PROVIDENCE MUTUAL FIRE INSURANCE Co.¹ (Supreme Court, Rhode Island, September Term, 1860.)
Two thirds Clause. — Estoppel. — Quitclaim. — Change of Occupation.

Where the directors of a mutual fire insurance company are empowered by charter "to determine the sum to be insured upon any building, provided it do not exceed three fourths of the value thereof," but are, by the general powers invested in them, to determine the value of the building, the company, when sued for a loss under a policy, is estopped from objecting that the sum insured by the directors exceeded the prescribed limit of value, — there being no fraud or misrepresentation as to value on the part of the insured.

A plea alleging such excess of insurance over value in full answer to a count upon the policy is bad upon demurrer, inasmuch as it goes only to such excess, — and thus sets up but a partial defence to the count.

A fire policy taken out from a mutual company by a mortgagor of a house upon his interest in it, though assigned with the assent of the company to the mortgagee, is avoided by a quitclaim deed by the mortgagor of all his interest in the land to the mortgagee, executed after the assignment and before the loss, the policy never having been ratified and confirmed by the company; and the charter providing that upon alienation of a house insured "by sale or otherwise," the policy shall be *ipso facto* void unless ratified and confirmed to the alienee.

Such policy too, upon a house described therein as "occupied for a dwelling-house," "the basement being of stone and wood," becomes void in the hands of the mortgagee by the use and occupation of the basement of the house, after the assignment and before the loss, as a joiner's shop, although such change of use was unknown to the mortgagee; the charter expressly providing that "no policy extend or be construed to extend" to such and other specified risks, "unless the same are expressly mentioned in the policy, and a proportional premium and deposit paid."

HARLOUS W. WETHERELL *vs.* CITY FIRE INSURANCE Co.²
 (Supreme Court, Massachusetts, October Term, 1860.) *Use of Premises.*

A policy of insurance against fire, containing a provision that it shall cease and be of no force or effect if the premises insured shall be appropriated, applied, or used for the purpose of carrying on or exercising any trade, or of keeping or storing any article, denominated hazardous or extra hazardous in the terms and conditions annexed to the policy, in which, among other things, "sail-makers" are denominated hazardous, and "confectionery and confectionery manufacturers" extra hazardous, is rendered void by a hiring of a portion of the building insured for a sail-loft, and carrying in a sail-maker's stock and tools, although without commencing work, and by the keeping of a small quantity of confectionery in glass jars on a counter or shelf in a room occupied as a barber's shop in the building insured.

A policy of insurance against fire, effected by a mortgagor out of possession, which by its terms is to cease and be of no effect if the premises insured shall be used for certain specified purposes, may be rendered void by the use of them for such purposes by a lessee of the mortgagee in possession.

¹ 6 R. I. 517.² 16 Gray, 276.

Hazardous Articles. — Store Fixtures.

EZRA WHITMARSH & another vs. CONWAY FIRE INSURANCE Co.¹

(Supreme Court, Massachusetts, October, 1860.)

Hazardous Articles. — Store Fixtures.

A policy of insurance on a "stock in trade, consisting of the usual variety of a country store, except dry goods," with "permission to keep and sell burning fluid and gunpowder;" founded on an application which is made a part thereof, which states the property to be "the stock in trade, consisting of groceries, provisions, and such goods as are usually kept in a country store, except dry goods;" and declaring that if certain articles denominated hazardous, extra hazardous, and risks prohibited, enumerated therein, are kept in any premises insured, the policy shall be void, unless therein otherwise specially provided for; is not avoided by the keeping of some of these articles, if they are articles usually kept for sale in a "country store;" and parol evidence is admissible to prove this.

Evidence is admissible of a well settled custom by which the words "store fixtures" in a policy of insurance are applied to all furniture and other articles in a shop or warehouse, necessary or convenient for use in the course of trade.

ACTION OF CONTRACT upon a policy of insurance to the plaintiffs "on their stock in trade, consisting of the usual variety of a country store (except dry goods), and on their store fixtures, all contained in the wood building with brick basement, occupied by the assured, situated in East Bridgewater, Mass. Permission to keep and sell burning fluid and gunpowder, as per application." And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall at any time after the making and during the continuance of this insurance be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates, or of risks prohibited, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates or of risks prohibited, unless herein otherwise specially provided for, or hereafter agreed by this company in writing and added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, used, or occupied, these presents shall cease and be of no force or effect. And it is moreover declared that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and

¹ 16 Gray, 359.

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resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for; and no condition can be waived except in writing signed by the secretary."

Annexed to the policy were five classes of hazards, denominated respectively "not hazardous," "hazardous," "extra hazardous," "memorandum of hazards which will be insured at special rates of premium," and a memorandum of hazards "prohibited and not to be insured at any rate of premium." Among the "trades and occupations, goods, wares, and merchandise" denominated extra hazardous were "burning fluid" and "earthen or glass ware;" in the memorandum of hazards to be insured at special rates of premium was included "oil;" and in the memorandum of articles not to be insured at any rate of premium were "gunpowder," "friction matches and match shops."

Among the conditions annexed to the policy were the following: "Applications for insurance must specify," "in case of goods or merchandise, whether or not they are of the description denominated hazardous or extra hazardous, or included in the memorandum of special rates. And a false description by the insured of a building or of its contents, or any misrepresentation or concealment, or omitting to make known any fact or feature in the risk which increases the hazard of the same, or in a valued policy, an overvaluation, shall render absolutely void a policy issuing upon such description or valuation. And if any application or survey, plan or description, of the property herein insured is referred to in this policy, such application or survey, plan or description, shall be deemed and taken to be a warranty on the part of the assured."

The application, which was expressly made a part of this policy and warranty on the part of the assured, requested insurance "on stock in trade, consisting of groceries, provisions, and such goods as are usually kept in a country store, with the fixtures of the same, except dry goods;" and in answer to the interrogatory, "Is there any other fact or circumstance affecting the risk?" stated, "Applicants want permission to use and sell burning fluid, and also to retail gunpowder, to be sold only in the daytime."

At the trial in the superior court, before Russell, J., it was admitted that the plaintiffs, at the time of the making of the contract of insurance and during the existence of the policy, and at

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the time of the fire, kept for sale in their shop, as a part of their usual stock in trade, whale oil, friction matches, and earthen and glass ware. The plaintiffs offered evidence that all these were articles usually kept in "country stores," and so were embraced in the terms of the policy. But the judge excluded the evidence, and ruled that keeping these things for sale had avoided the policy.

The plaintiffs, under the head of "store fixtures," claimed to recover for the loss of certain tools, implements, and furniture, not affixed to or forming part of the building; and offered evidence of a well settled custom among underwriters and the community generally, by which the terms "fixtures" and "store fixtures" were used in insurance to denote all the movable articles of shops and warehouses which are convenient or necessary for use in the course of trade; and that these articles were of the kind usually known and called by that name. The defendants objected that they were not fixtures within the well settled legal definition of the term, and that therefore the plaintiffs could not recover for the same; and the judge so ruled, and excluded the evidence. The jury returned a verdict for the defendants, and the plaintiffs alleged exceptions.

CHAPMAN, J. The words of a written contract are the sole expositors of its meaning, except so far as they refer to something without the instrument. If another document is referred to, — if, for example, a policy of insurance refers to an application or survey, or to by-laws or regulations, — the document referred to is to be construed in connection with the contract, and as a part of it, so far as the reference makes it such. If a custom or usage is referred to, the custom or usage is to be ascertained as in other cases by the proper evidence. If a term of art or trade is used in the contract, having a peculiar signification among persons conversant with the art or trade, the testimony of such persons becomes proper evidence to prove the meaning. These principles are to be applied to policies of insurance in the same manner as to other contracts.

Taking, then, the policy before us, we find in the printed form a provision referring to certain lists of property which are classed as hazardous, extra hazardous, special rates, and not insurable; and the keeping of these articles in a building insured renders the policy void, "unless herein otherwise specially provided for,

Removal.

or hereafter agreed by this company in writing, and added to or indorsed upon this policy." Turning to the description of property insured, we find it to be "their stock in trade, consisting of the usual variety of a country store (except dry goods) and on their store fixtures." The usual variety of a country store is thus provided for in the policy, and the defendants agree to insure it. But what such usual variety is, can only be ascertained by parol evidence. We do not think that this construction of the language of the policy is changed by the special permission to keep burning fluid and gunpowder.

If, then, the plaintiffs can prove that oil, friction matches, earthen ware, and glass ware, in such quantities as they kept them, compose a part of the usual variety of a country store, they have not violated their policy by keeping those articles. *Elliott v. Hamilton Mutual Ins. Co.* 13 Gray, 139. The parol evidence offered on this subject was pertinent and ought to have been admitted. So if the term "store fixtures" is a term of trade, commonly used among traders and insurers, and is used in such a signification as to include any or all the articles mentioned as such in the report, those were insured by this policy. The parol evidence offered on this subject was proper, and ought to have been admitted.

The case of *Lee v. Howard Fire Ins. Co.* 3 Gray, 588, *ante*, cited by the defendants' counsel, differed from the present case in this respect, that there was nothing in the description of the articles insured that could, either directly or by reference, include a grist mill. The cases of *Macomber v. Howard Fire Ins. Co.* 7 Gray, 257, *ante*, and *Witherell v. City Fire Ins. Co.* 16 Gray, 276, *ante*, differed from this in making no mention of the usual practice, which these plaintiffs offered to prove. *Exceptions sustained.*

McCLURE vs. THE LANCASHIRE INSURANCE COMPANY.¹

(Common Pleas, Ireland, November, 1860.)

Removal.

A policy of insurance effected with the Lancashire Insurance Company had indorsed on it a condition, "that persons changing their habitations or warehouses might preserve the benefit of their policies, if the nature and circumstances of such policy were not altered; but such insurance would be of no force till such removal or alteration were allowed at the office by indorsement on the policy." *McC. & Co., of Belfast, whilst removing*

¹ 6 Irish Jur. N. S. 63.

Verbal Contract. — Authority of Agent. — Book of Entries as Evidence.

goods insured in stores in Victoria Street, to stores situate in Corporation Street, had such removal allowed at the office of the insurance company as appeared by an indorsement to that effect on the policy. Before such removal had been completed, a fire broke out in the stores in Victoria Street, which consumed a large quantity of the goods in question. McC. & Co. brought an action on the policy to recover damages for the loss of their goods in Victoria Street. *Held*, that such action was not maintainable.

MONAHAN, C. J. We are of opinion that, according to the true construction of this policy, one risk only was contemplated, namely, as to goods in a particular place stated in the policy. A power was also given to substitute a different repository for the one named, and it appears that at the time when the fire in question occurred, goods of the full value of the amount of the policies were deposited in the stores in Corporation Street. According to the construction contended for by the plaintiffs, a double liability would be imposed on the company with respect to the same goods.

The court accordingly ruled in favor of the defendants.

PATRICK HARKINS vs. QUINCY MUTUAL FIRE INSURANCE CO.¹
(Supreme Court, Massachusetts, November Term, 1860.) *Statement of Value.*

A by-law of an insurance company, providing that in case of loss the assured shall, as soon as possible, deliver a particular account in writing, under oath, stating the value of the property lost, and of that saved, is sufficiently complied with by a claim for a total loss of the property, stating its value, if some of the property is saved without his knowledge.

OLIVER L. SANBORN & another vs. FIREMAN'S INSURANCE CO.²

(Supreme Court, Massachusetts, November, 1860.)

Verbal Contract. — Authority of Agent. — Book of Entries as Evidence.

A contract of insurance need not be in writing.

An insurance company authorized by their charter "in their name and by the signature of their president for the time being, or by the signature of such other person and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct," to make contracts of insurance, have authority to make an oral contract of insurance.

The agent of an insurance company, authorized by them "to effect fire insurance upon buildings, goods, wares, and merchandise, and for this purpose to survey risks, fix the rate of premium, and issue policies of insurance signed by the president, attested by the secretary, and countersigned" by himself, has authority to make an oral contract of insurance.

An oral contract of insurance for one year, including its date, is a contract to be performed within a year, and therefore not within the statute of frauds.

In an action upon an oral contract of insurance, the plaintiff's agent testified that he pre-

¹ 16 Gray, 591.

² 16 Gray, 448.

pared a general application, and left it at the office of the defendants' agent, and the clerk of the latter came to him and said that he would take two thirds of the risk and allow a certain commission; that the plaintiff's agent went to the defendants' agent, and the amount, rate, and time of insurance was agreed upon between them; that the two agents had running accounts with each other and settled once a month; that the same afternoon the property was destroyed by fire, and the defendants' agent called upon the plaintiff's agent and said he did not consider the risk completed. *Held*, that there was evidence for the jury of a contract of insurance which began immediately.

In an action upon an oral contract of insurance, the defendants' book of entries of risks taken, in which the alleged contract is not entered, is inadmissible to prove that there was no contract.

ACTION OF CONTRACT on an agreement to insure the plaintiffs' stock of paper and hydraulic press in the Gerrish Market in Boston, against fire for the term of one year from and including the 12th of April, 1856. At the trial before Hoar, J., the following facts were proved: —

The defendants were an insurance company established under the laws of South Carolina. Their charter provided that "the said corporation in their said name, and by the signature of their president for the time being, or by the signature of such other person and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct, shall have a right to make contracts and underwrite policies of insurance and indemnity against fire" on buildings, vessels, goods, wares, and merchandise, and other property, within or without that state.

Oliver Brewster was their agent in Boston, authorized by his power of attorney "to effect fire insurance upon buildings, goods, wares, and merchandise," "and for this purpose to survey risks, fix the rate of premium, and issue policies of insurance, signed by the president, attested by the secretary of the said company, and countersigned by the said Oliver Brewster, and to assent to the transfer and assignment of the same, which policies, so issued and assigned, shall have full force and effect to bind said company."

The property was of greater value than the amount alleged to have been insured thereon, and was destroyed by fire about one o'clock in the afternoon of the 12th of April, 1856. Then plaintiffs, after the fire and before suing, demanded payment of the loss, and also demanded policies, and offered to pay the premium.

William H. S. Jordan, called as a witness for the plaintiffs, testified as follows: "I am an insurance agent; I was employed by the plaintiffs some days before the 11th of April, to effect insurance on their stock and hydraulic press in the Gerrish Mar-

ket; on the 11th of April I went to Oliver Brewster and asked him if he was disposed to take a risk in the Gerrish Market; after some conversation as to rate and companies, he said he thought he could take it in the Farmers' and Mechanics' and in the Fireman's insurance companies; and if I would furnish an application and survey, he would see. I prepared a general application and survey for \$6,000 insurance, and left it at Brewster's office that afternoon, but Brewster had then gone. About twelve o'clock the following day, the 12th of April, Brewster's clerk came in and said Brewster would take two thirds of the risk, one third in each company, and would only allow me five per cent. commission. I replied that I would go and see Brewster, and did so immediately, at his office. Brewster and I agreed to alter the amount to one third of \$1,000 on the press, and one third of \$5,000 on the stock, in each company. There were no other companies spoken of as binding the risk; we may have spoken of other companies for the balance of the insurance that I wanted. Brewster offered to negotiate for the balance, but I told him I would fix that myself. Rate fixed on was one and a half per cent.; property, as described in application; time, one year. I caused an entry of the transaction to be made in my books. Brewster and I had accounts with each other, commenced in 1853; we settled once a month; we completed the policy, delivered it, and charged the premiums, and at end of the month settled, and usually paid the balance in cash."

On cross-examination, the witness testified: "Brewster would allow me only five per cent. commissions; it is very probable that we did talk the matter of commissions over; I urging my ten, he saying five per cent. was enough. I made an agreement for the insurance, which was completed; but about commissions I have no recollection. I went to get further insurance at other offices. I then returned to my office, and finding there would be fractions, I sent a paper by a boy to Brewster about the division of the risk — \$333 on the press, and \$1,667 on the stock. I did not know then of the fire. Brewster came in immediately after the return of my boy, and said, 'I see that building is on fire;' I said, 'I heard it is;' he gave me to understand that he did not consider the risk completed on his part."

After the plaintiffs had introduced their testimony, the de-

defendants requested the judge to instruct the jury as follows: "1st. That the contract of insurance is required to be in writing, and that a suit at law is not maintainable on an oral agreement. 2d. That the laws of South Carolina incorporating this company require that the insurance should be by a policy signed by the president, &c., and that a suit could not be maintained upon an oral agreement of Brewster to insure. 3d. That Brewster had no authority to bind the company in any other way than by a policy signed by the president, attested by the secretary, and countersigned by himself. 4th. That this being a contract not to be performed within a year, it was void by the statute of frauds. 5th. That there was not sufficient evidence of a complete bargain for the plaintiff to maintain his case." The presiding judge, for the purposes of the trial, ruled the first four points in favor of the plaintiffs, and ruled that there was evidence to go to the jury of a contract of insurance.

The defendants then called as a witness Oliver Brewster, who, after describing the interview with Jordan on the 11th of April substantially as Jordan had done, testified further as follows: "The next day I saw the application on my desk; I sent my clerk down to Jordan, to say that we could not allow him full commission; that it was an extra hazardous risk. Jordan came up to the office soon after, about twelve o'clock, and we had some conversation. Jordan claimed the full commission of ten per cent., and I refused to allow that, on account of the character of the risk. I proposed dividing it among several companies, as it was not a good risk. The point in dispute between us was the amount of the commission. I said I would not allow it; he claimed the full commission. There was no agreement; nothing was said about my insuring this property, and leaving the commission open. The next thing I heard was, a boy came up from Jordan's office with a memorandum, I think half an hour after. I told the boy I would see Jordan; I went down immediately. On my way down I heard of the fire, and just put my head into Jordan's office, and told Jordan we had no insurance on the building."

Upon cross-examination Brewster said: "I had ten per cent. commission allowed me by the defendants. Jordan's commission would come from my commission, and not from the defendants. I went to Jordan's office because the boy came up and said

Jordan wanted insurance effected. The boy said that the memorandum which he brought contained the division Jordan wanted made of the risk. I went because I had not effected any insurance, and I wanted him to know he was not insured. The only advantage to the defendants of five per cent. commissions over ten per cent. commissions was in discouraging the offering of such risks, by not allowing full commissions. I was not a moment in Jordan's office; merely said I had no insurance for him on Gerrish Market. He said he hoped I would pay the loss. I had a monthly account with Jordan; generally settled premiums and commissions once a month."

The defendants further proved that Brewster always had blank policies of the company, signed by the president, and attested by the secretary, which he countersigned and issued, to insure parties applying.

The defendants also, to corroborate Brewster's testimony, and as evidence tending to show that there was no agreement for insurance completed, offered in evidence a book kept by him for them, in which he entered all risks taken by him for the company, as soon as taken. But, upon objection of the plaintiffs, the judge ruled that the book was inadmissible.

After the jury had retired, they came into court and inquired of the judge whether it was necessary for them to find that the commissions to be allowed Jordan by Brewster were agreed upon between Jordan and Brewster. The judge instructed them that they must determine whether the commissions of Jordan were a part of the contract for insurance; and that if they were satisfied that the commissions were no part of the bargain for insurance between Jordan and Brewster, but that they had agreed upon the insurance and the terms thereof, and left the commissions to be adjusted between themselves, they should find for the plaintiffs.

The jury found for the plaintiffs, the defendants alleged exceptions, and the judge reported the case to the full court.

HOAR, J. 1. The first ground of objection to the verdict is, that a contract of insurance can only be made in writing. No principle of the common law seems to require that this contract, any more than other simple contracts made by competent parties upon a sufficient consideration, should be evidenced by a writing. No statute of Massachusetts contains such a require-

ment. Upon principle, therefore, we can find no authority in courts to refuse to enforce an agreement which the parties have made, if sufficiently proved by oral testimony. On the contrary there are decisions which recognize contracts of insurance resting in parol. *M' Culloch v. Eagle Ins. Co.* 1 Pick. 280; *Kennebec Co. v. Augusta Insurance & Banking Co.* 6 Gray, 204; *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.* 19 How. 318; affirming *S. C.* 2 Curt. C. C. 524; *Hamilton v. Lycoming Mutual Ins. Co.* 5 Barr, 339.¹ Some of the text writers, indeed, express a doubt whether valid insurance could be made, except in writing. Mr. Duer, in his treatise on insurance, remarks that "in this country there is no statute in any of the states, that requires that the contract of insurance shall be in writing; and upon the principles of the common law, an unwritten, or in technical language, a parol agreement, is doubtless sufficient; but as the usage of a written contract has long and universally prevailed, it has probably acquired the force of law, and it is doubtful whether an action upon a contract, merely oral, would now be sustained." 1 Duer Ins. 60. See, also, 1 Phil. Ins. § 8. In *Smith v. Odlin*, 4 Yeates, 468, Chief Justice Tilghman expressed a doubt whether a valid insurance could be made otherwise than in writing; and in *Cockerill v. Cincinnati Mutual Insurance Co.* 16 Ohio, 148, it was held that it could not.

But in 1 Parsons Marit. Law, 19, the opposite opinion is stated. In *Sanford v. Trust Fire Ins. Co.* 11 Paige, 556,² Chancellor Walworth discusses the question without deciding it, the inclination of his opinion seeming to be in favor of the validity of the oral contract. And it was so held by the court of appeals in *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.* 19 N. Y. 305, ante. It is not easy to see the force of the reasoning which would infer, that, because parties usually make their contract in one way, it would be void when they choose to make it another, equally good at common law, and not prohibited by any statute. In determining whether, in any case, a complete and perfect contract had been made, the circumstance that a contract in writing was contemplated, and had not been executed, would certainly be entitled to great weight. *Real Estate Mutual Fire Ins. Co. v. Roessle*, 1 Gray, 336.³

2. The next objection is, that the defendants had no authority

¹ Ante, vol. 2, p. 542.

² Ib. p. 400.

³ Ante, vol. 3, p. 705.

to make the oral contract declared on, because they were by their charter authorized only to make contracts by the signature of their president or of such other person as their rules and by-laws should direct. The case chiefly relied on to support this position is that of *Head v. Providence Ins. Co.* 2 Cranch, 127. But while the principle which that case declares, that a corporation, being the mere creature of law, can have no powers but such as are derived from the act which creates it, is undoubtedly a sound one, the application of the principle has been very much modified in other cases. *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326; *Bank of United States v. Dandridge*, 12 Wheat. 69; *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56; *Foster v. Essex Bank*, 17 Mass. 497; *Tayloe v. Merchants' Fire Ins. Co.* 9 How. 390; *Commercial Mutual Marine Ins. Co. v. Union Mutual Fire Ins. Co.* 19 How. 318. We cannot think that a provision in the charter of an insurance company, authorizing contracts authenticated by the signature of a particular officer, and without any words of restriction, should generally be construed to limit the powers of the company, and to prevent them from making contracts within the ordinary scope of their chartered powers. On the contrary, the phraseology of those statutes respecting the execution of policies should be regarded as consisting simply of enabling words, not restraining the power which they confer to make contracts, of which the policies are the evidence. 19 How. 321, before cited.

3. The objection that the agent had only power to issue policies, and not otherwise to make contracts binding on the defendants, comes within the same rule of construction. His power of attorney authorized him "to effect insurance," and "for this purpose to survey risks, fix the rate of premium; and issue policies of insurance, signed by the president," &c. We are of opinion that this gave him authority to make the preliminary contract, as well as to issue the policy. He was not a special agent, employed merely to receive and transmit proposals to his principal, but had power to do whatever the company could do in effecting insurance; and it appeared by the evidence of the defendants that he was furnished with policies signed in blank, to be filled up and issued at his discretion.

4. We are of opinion that the contract was to be performed

Warranty. — Materiality.

within a year, and is therefore not included in the provisions of the fifth clause of the Rev. Sts. c. 74, § 1. When time is spoken of, any act is within the time named that does not extend beyond it.

5. We think there was evidence, competent for the consideration of the jury, that the risk was to commence at the time the contract was made.

6. No authority is cited in support of the proposition that the omission to make an entry of a contract in a book kept by one party is evidence, in favor of that party, that no contract was made. Such an entry constituted no part of the contract, and the plaintiffs had no knowledge of the habit of the defendants' agent in that respect, and could not be affected by it. It was clearly inadmissible.

Judgment on the verdict for the plaintiffs.

As to verbal contracts of insurance, see cases cited in note to *Jones v. Provincial Ins. Co.*, ante.

NATHANIEL HAYWARD, plaintiff and appellant, *vs.* LIVERPOOL AND LONDON FIRE AND LIFE INSURANCE CO.¹ (Superior Court, New York City, November, 1860.) *Explosion.*

The policy declared that the defendants should "not be liable to make good any loss or damage by fire which shall happen or arise by any explosion." These terms create an exception to the general language of the policy, by which the defendants promise to make good such loss or damage as shall be occasioned by fire to the property insured. It is as if the company had said, we will make good to you any loss which you may sustain by fire, unless the fire is caused by an explosion. Nor is this otherwise by reason of the fact that the defendants had insured the very engine which exploded. But see *contra*, *Hayward v. Northwestern Ins. Co.*, post. The above case was, however, affirmed on appeal, 3 Keyes, 456; *S. C. post*, vol. 5.

MARSHALL *vs.* TIMES FIRE INSURANCE CO.² (Supreme Court New Brunswick, Michaelmas Term, 1860.) *Warranty. — Materiality.*

An insurance company required applications for insurance to be made on printed forms containing certain questions which were to be *minutely* answered, and were declared to form the basis of the insurance. One of the questions was: "Is the property involved in law, or mortgaged; if the latter, to whom, and for what amount?" The answer was, "There is a mortgage on the house for £300," which was untrue. This application was referred to in the policy, one of the conditions of which was, that if the buildings were described otherwise than they really were, the insured should not be entitled to any benefit under the policy. *Held*, 1. That the answer to this question amounted to a warranty, and being untrue, rendered the policy void. 2. That being an essential part of the contract, its materiality was not a question for the jury.

¹ 7 Bosw. 385.

² 4 Allen, New Bruns. 618.

Adjustment of Loss.

PEORIA MARINE & FIRE INSURANCE CO. *vs.* SUSAN WILSON.¹

(Supreme Court, Minnesota, December, 1860.)

Adjustment of Loss.

A policy of insurance contained the following condition: "Where property insured in this company is damaged by removal from a building in which it is exposed to fire, said damage shall be borne by the insured and insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant." A portion of the property insured was wholly destroyed by fire, and another portion damaged by removal. Action to recover all the damage sustained. The court instructed the jury "that the sum insured being \$2,500, and the value of the goods being estimated in the policy at \$5,000, the damage occasioned by the removal of the goods (if any) must be borne in the following proportions, under the condition above quoted. 'The plaintiff must bear one third of the loss, and the defendant two thirds.'" *Held* to be error. The condition means that the damage occasioned by the removal of the property shall be borne by the parties according to their respective interests or risks, the share of either bearing the same proportion to the whole damage that his interest in the property or risk bears to the whole value.

By the Court, EMMETT, C. J. The decision of the case we have made to depend upon the interpretation of the fifteenth condition of the policy of insurance. The condition is as follows: "Where property insured in this company is damaged by removal from a building in which it is exposed to fire, said damage shall be borne by the insured and insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant."

A portion of the property insured by this policy seems to have been wholly destroyed by fire, a portion damaged by the fire, and still another portion damaged by the removal. The plaintiff brought her action to recover for all of the damage sustained. On the trial, evidence was offered to show the amount of the damage occasioned by removing the goods; and it being necessary to determine the relative proportions in which it should be borne by the parties respectively, the judge instructed the jury, "that the sum insured being \$2,500, and the value of the goods being estimated in the policy at \$5,000, the damage occasioned by the removal of the goods (if any) must be borne in the following proportions, under the fifteenth condition of the policy, to wit: The plaintiff must bear one third of the loss, and the defendant two thirds."

Although the terms of the policy, literally taken, may possibly

¹ 5 Minn. 53.

Adjustment of Loss.

admit of such an interpretation, yet we do not think it is correct, or that it is in accordance with the intention of the parties.

The primary object of a policy of insurance is to indemnify the party against loss and damage by fire. The person insured must therefore have an interest in the property insured, not only at the time of the insurance, but at the time of the loss. The amount for which the property is insured — except in the case of a valued policy — is not to be considered as the agreed indemnity, even where there is a total loss, but as the extent of the insurer's liability. The amount of the recovery is regulated solely by the value at the time of the loss, because this fully indemnifies the insured for the actual loss or damage.

It not unfrequently happens, however, that parties insured find it necessary or prudent, where property is in danger of being destroyed by fire, to have it removed; indeed it is not only their duty so to do, but, in most policies, it is expressly provided that they shall use all possible diligence in saving and preserving the property. In all such instances, the damage sustained by removal should be borne by the parties according to their respective interests. This is the equitable rule, and would govern, were there no contract respecting it. The interests of the parties respectively depend, in such cases, upon the value of the property, and the amount insured. If the property is insured for its full value, the insurer assumes all the risks; but if insured for one half only, the insured takes half the risk, or, in other words, insures himself to that extent. It is but reasonable, therefore, that he should bear his share of the expense incurred, and damages sustained in preserving the property from destruction, and that share should correspond with the interest he has at stake. If a party, instead of taking any risk upon himself, insured to the full value of his property in different companies, the companies thus insuring would pay any loss in exact proportion to their several risks; and so, too, as to expenses and damages caused by removal. This apportionment of the damage is upon the principle that each party ought to bear the loss in proportion to his interest. And we believe that it was intended by the fifteenth condition of this policy simply to declare the application of this well established principle to this class of damages.

But according to the interpretation given by the judge below, the parties do not bear the damage thus sustained, according to

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their respective interests ; for the insurers, though they have but half the risk, are made to pay two thirds of the damage, and by the same rule, had they insured the property at but one tenth of the value—thus incurring but one tenth of the risk—they would nevertheless have had nine tenths of the loss to bear. This is simply reversing the natural and reasonable rule before spoken of, making the party having the least interest in the preservation of the property pay the greatest portion of the damage,—and the less that interest is, in proportion to the value of the whole, the greater his proportion of the loss. Each party's liability for such damages increases, according to this ruling, as the amount of interest he has at stake decreases, and *vice versa*. If property, valued at \$10,000, on which there was an insurance of but \$1,000, should be damaged by removal to the amount of \$1,000, the insurers, instead of bearing but one tenth, or \$100 of the loss, would have nine tenths or \$900 of it to pay ; while the insured, who had nine times the amount at risk, would bear but one tenth or \$100 of the loss. Each party will thus be seen to bear exactly that portion of the damages which the other ought, in justice, to have borne. We cannot believe the parties ever intended to lay down any such rule ; it is not founded in reason, but is purely arbitrary, and violates every principle of equity.

We hold that the true interpretation of the fifteenth condition—if it has any meaning at all—is, that the damage occasioned by the removal of the property exposed to a fire shall be borne by the parties according to their respective interests or risks, the share of either bearing the same proportion to the whole damage that his interest in the property or risk bears to the whole value. There is an ambiguity about the language used which does not appear until the attempt is made to ascertain what is intended by it. In such a case the difficulty is best solved by a reference to what would have been the legal rights of the parties under the circumstances, had they not attempted to define. And if the parties have failed to furnish a new rule, they must abide by that furnished by the law.

With this interpretation it necessarily seems to follow that the judge erred in confining the parties to the value of the property as specified by the plaintiff in her application for insurance, instead of the actual value at the time of the loss. We do not mean to say, where the parties have agreed upon the value of

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particular property insured, and the same property is lost or damaged by the fire, or by the removal, that the question of value is open to inquiry, unless there has been fraud or misrepresentation. But, except in a valued policy, the value of the property insured at the time of the insurance is of no importance, inasmuch as the loss is to be determined by the actual cash value at the time of the fire. This is particularly provided by the policy in this case, and the value of the stock on which the risk is taken is not even mentioned; the only reference to it is to be found in the application for insurance, which forms no part of the subsequent contract, and is only important as showing the representations made. The insurers, without regard to the amount or value of the whole stock insured, agree by this policy, "to make good unto the assured all such immediate loss or damage, not exceeding the amount insured [\$2,500] as shall happen by fire to the property," &c., "the said loss or damage to be estimated according to the true and actual cash value of the property *at the time the same shall happen.*" It matters not, therefore, so far as the loss and damage by the fire is concerned, what may have been the value of the whole stock at the time it was insured, or indeed, at the time of the fire. All the insurers are bound to do is to pay the actual cash value of the goods destroyed, and the actual damage sustained by the fire to an amount not exceeding \$2,500.

If then the value of the whole stock at the time of the insurance is not named in the policy and formed no part of the stipulations of the contract, and the parties are governed, in regard to the loss and damage by the fire, by the actual cash value at the time, why should they be confined, in apportioning the damages sustained by removal, to the value as estimated in the mere application for insurance, made by one party only, and which estimate the other party cannot be said to have assented to or denied? It seems to me that so far as the terms of the policy throw any light upon the intention of the parties, they expressly ignore any valuation except the actual cash value at the time of the fire. And if we are right in holding that these damages should be borne by the parties in proportion to the interest of each, then that interest can only be determined by ascertaining the actual value of the whole stock at the time of the removal. The assured might have increased her stock to ten thousand dol-

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lars at the time the loss occurred. In that event she would have had three times more interest than the insurers in the preservation of the property, and ought to bear three fourths of the damage by removal. On the other hand, the stock may have been reduced even below the amount for which it was insured, in which event she would really have had nothing at risk, and the insurers should have borne the entire damage sustained.

We think the court below erred nor only in the interpretation given to the fifteenth condition of the policy, as to the proportion in which the damages should be borne, but in instructing the jury that the stock was valued in the policy at \$5,000, and confining the parties to that valuation. *New trial awarded.*

BIGLER *et al.* vs. NEW YORK CENTRAL INSURANCE CO.¹

(Court of Appeals, New York, December, 1860.)

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The condition requiring notice of other insurance refers to all insurance not void upon the face of the policy.

THE case is stated in the opinion.

DAVIES, J. The only question presented for our consideration is, whether the plaintiffs, in the face of the conceded violation of their agreement with the defendants, can recover on this policy. That agreement was, that in case they should effect any other insurance upon the property covered by the defendants' policy, then the defendants' policy was to cease and be of no further effect, unless the plaintiffs should give notice to the secretary of the defendants of such further insurance, and have the same indorsed on the policy, or have the same otherwise acknowledged in writing by the corporation.

Here it is undeniable, upon the facts proved in the case, that the plaintiffs did effect further and other insurance upon the same property as that covered by the policy of the defendants. By virtue of the agreement between the parties, the policy issued by the defendants was, from the happening of that event, to cease and be of no further effect.

But it was further agreed between them, that this result might be obviated on the part of the plaintiffs, if they should give notice to the secretary of the defendants of such further or other

¹ 22 N. Y. 402.

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insurance, and have the fact thereof indorsed on the policy issued by the defendants, or have the existence of such further insurance acknowledged by the corporation of the defendants in writing. It is not pretended that the plaintiffs have done either of the things agreed upon, and required to revive their policy, or that they ever made any effort to comply with these stipulations on their part. It would appear that they studiously concealed from the defendants the fact of such other insurance, in violation of the express agreement with them and clearly in fraud of the rights and security which the defendants had by virtue of the stipulations contained in their policy. It is too obvious to need comment, that it was vital to the security of the insurer that he should be kept informed of the extent of insurance effected by the insured. The value of the insured property was ascertained at the time when the first insurance was effected, and it is well known that the insurer never insures to the full value of the property; for in that event he would lose the watchful care and vigilance of the assured, which self-interest always excites to protect the insured property. But whatever were the motives or the considerations which impelled the parties to enter into this agreement, it is clear and specific, and founded upon a good consideration and wholly unobjectionable; a compliance with its terms on the part of the plaintiffs was a condition precedent to their right of recovery, and as it is undeniable that they have failed to comply, we do not see how they can maintain this action.

The plaintiffs seek to excuse themselves for this breach of their agreement, by alleging that the policy obtained by them from the Globe Company was void, by reason of the stipulation and agreement contained in that policy, "that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this company, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect." The plaintiffs, to enable them to maintain their action against these defendants, now take the ground that in fraud of this agreement with the Globe Company, they concealed from them the fact of the prior insurance with the defendants, and that such concealment rendered the Globe policy void. They say, therefore, they had no further or other insurance on the same property, and had not violated their agreement in that regard with these defendants. In assuming this

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position, they overlook the fact that this agreement or stipulation was made for the benefit of the Globe Company, and that it was competent for that company to waive it. It would appear that in the suit brought by these plaintiffs against that company, its liability on the policy was acknowledged, and a draft given to pay the amount of the loss. Both parties to the policy, therefore, treated it as a valid and subsisting instrument, and it will not answer for these plaintiffs now to shift their ground and set up that this policy is void, and was so from the time it was issued, by reason of their fraudulent concealment of the fact of the prior insurance. But the agreement between the parties to this action was, that the policy of the defendants was to cease and be of no further effect if the plaintiffs thereafter "should make any other insurance upon the same property," &c. It was the act of making another insurance which was to vitiate and render null the defendants' policy. We think it was no answer for the plaintiffs to make to allege that the other insurance might legally have been resisted and avoided. This was not what the parties had agreed to. For reasons before alluded to, the insurer and the insured agreed that if the latter thereafter made any other insurance on the property, such act should vitiate the policy. We are not at liberty to make a new contract for the parties, but to inquire whether that made has, in fact, been violated. We can well see that the defendants did not intend to have the validity of their policy tested, or the risk they incurred depend on the question whether the subsequent insurance should be finally adjudged to be legal and valid, or ultimately held to be illegal and invalid. The evil they intended to guard against was not to be controlled by that fact. They meant to have the plaintiffs take some risk themselves in reference to the insured property, and this was secured by its not being insured to its full value. It left a margin at their risk, and it was for the defendants to determine its extent. If the plaintiffs made other insurance, this safeguard was lost, and that was precisely what the defendants intended and had a clear right to prevent, by the clause under consideration. The effect of such and similar agreements has been considered by the supreme court of this state. In the case of *Smith v. The Saratoga County Mutual Fire Insurance Co.* 3 Hill, 508,¹ the policy contained a clause that the in-

¹ *Ante*, vol 2, p. 94.

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terest of the assured was not assignable, and that if the same should be assigned without the consent of the company, then that the policy "should be void and of no effect." Bronson, J., in delivering the opinion of the court, says: "The parties have, in the strongest terms, declared that the policy shall immediately, and without any act on the part of the company, become absolutely void; and it is difficult to see how anything short of a new creation could impart vitality to this new body." In *Westlake v. The St. Lawrence Mutual Insurance Co.* 14 Barb. 206, where the policy contained a clause in all respects like that in the defendants' policy, Cady, J., says: "The defendants have the right to elect to withhold such acknowledgment, and thereby annul the policy, or to give the acknowledgment, and continue the policy in full force." It might be assumed, therefore, that the Globe policy could have been continued and rendered valid, and it was competent for that company at any time to elect to hold it a valid policy, notwithstanding the clause in reference to the prior insurance.

It is earnestly insisted, however, on the part of the plaintiffs, that in fact they had no other insurance on the property insured by the defendants' policy, that issued by the Globe Company being invalid, and that the other insurance, in the contemplation of the policy, means legal and valid insurance. In reference to its invalidity we have already made some suggestions. But assuming the position to be correct, that it was invalid, and that, consequently, the plaintiffs had no other legal insurance on the property, except that made by the defendants, can they recover on the facts proven in this case? The question thus presented arose in the supreme court of the United States in the case of *Carpenter v. The Providence Washington Insurance Co.* 16 Pet. 495.¹ Carpenter took out a policy from the defendants on the 27th of September, 1838, to run for one year. The policy contained a clause, that in case the insured should have already any other insurance on the property thereby insured, not notified to the insurers, mentioned in or indorsed upon the policy, then that insurance should be void and of no effect; and it also contained a clause in these words: "And if the said insured and his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument,

¹ *Ante*, vol. 2, p. 448

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or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." Annexed to the policy were proposals and conditions on which the policy was asserted to be made, and among them was the following: "Notice of all previous insurances, upon property insured by this company, shall be given to them and indorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect." On the 14th of December, 1837, a policy on the same property had been issued by the American Insurance Company of Providence to one Wheeler and said Carpenter; and in April, 1838, Wheeler sold out his interest in the property insured to Carpenter, who then became sole owner thereof, with this policy outstanding. The loss therein was payable to one Reid, who held a mortgage on the property insured, which Carpenter had assumed to pay. Subsequently, and on the 11th of December, 1838, the American Insurance Company renewed the policy of the 14th of December, 1837, for Carpenter, and at his request, for one year. This renewed policy was never notified to the Washington Insurance Company, nor acknowledged by them in writing. On this ground the Washington Insurance Company insisted that their policy of the previous 27th of September, 1838, was, according to the stipulations therein contained, utterly void. On the trial the court was requested by the defendants to instruct the jury that although the policy of the American Insurance Company was good upon its face, yet, in point of fact, as it was procured by a material misrepresentation by the owner of the cost and value of the premises insured, it was to be deemed utterly null and void; and, therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared on. The court refused to give the instruction asked for, and, on the contrary, instructed the jury that if the policy of the American Insurance Company was, at the time when that of the defendants was made, treated by all the parties thereto as a subsisting and valid policy, and had never, in fact, been avoided, but was still held by the assured as valid, then that notice thereof ought to have been given to the Washington Company, and, if it was not, the policy declared on was void. Story, J., in delivering the opinion of the court,

says: "We are of the opinion that the instruction asked for was properly refused, and that given correct." He says, on the facts assumed, the policy is merely voidable, and adds: "Be this as it may, it is, in our judgment, free from all reasonable doubt that notice of a voidable policy must be given to the underwriters, for such a case falls within the words and the meaning of the stipulations in the policy. It is a prior policy, and has a legal existence until avoided." . . . "Indeed, we are not prepared to say the court might not have gone further, and have held that a policy, existing and in the hands of the insured, and not utterly void upon its face, without any reference whatever to any extrinsic facts, should have been notified to the underwriters, even although by proofs afforded by such extrinsic facts it might be held, in its very origin and concoction, a nullity." After alluding to the reasons and considerations which manifestly operate upon the underwriters, in making the stipulations requiring notice of prior and subsequent insurances, he says: "But be the considerations as they may, we see no reasons why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation, according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his part, in order to entitle himself to the benefit of the contract; while, upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations which, but for these stipulations, would not have been entered into. We are, then, of opinion that there is no error in the second instruction; on the contrary, there is strong ground to contend that the stipulations in the policy, as to notice of any prior and subsequent policies, were designed to apply to all cases of policies then existing in point of fact, without any inquiry into their original validity and effect, or whether they might be void or voidable." Applying the principles thus clearly, and we think satisfactorily, enunciated by the supreme court, to the case under consideration, it would follow that the policy issued by the defendants ceased, and was of no further effect, upon the plaintiffs taking out a policy on the same property from the Globe Company without notice thereof to the defendants; and that such result follows whether the latter policy was void or voidable merely. It was another insurance on

the same property, which the plaintiffs agreed, if they made it, should be notified to the defendants; and the penalty of the omission of such notice was, that the defendants' policy should cease and be of no further effect. We regard this case as in point, and the reasoning of the court is satisfactory to us, and we think the rule adopted by it should be sanctioned by this court.

We have been referred to decisions holding a different doctrine, and they have been pressed upon us on the argument by the appellants' counsel. They are the cases of *Jackson v. The Massachusetts Mutual Insurance Co.* 23 Pick. 418;¹ *Stacey v. Franklin Insurance Co.* 2 Watts & Serg. 514;² *Clark v. The New England Mutual Fire Insurance Co.* 6 Cush. 342;³ *Philbrook v. The New England Mutual Fire Insurance Co.* 37 Maine, 137.⁴ In the case cited from 23d Pickering it appeared that, as in the present case, the condition of the subsequent policy was, that it was to be wholly void and inoperative if there was, at the time of issuing it, a subsisting insurance on the same property made without the knowledge and consent of the company issuing the second policy; and the second policy for this omission being thus wholly inoperative and void, the court held that it could not be set up in an action on the first policy, as evidence that the plaintiffs had procured a second insurance. The court say: "An insurance that shall operate to avoid the policy of the defendants, as a violation of the tenth article of their rules, must be a valid and legal policy, and effectual and binding upon the assured." And the learned judge giving the opinion adds: "This view of the case now taken does not render nugatory, and wholly ineffectual, the rule restricting the party assured from making a second insurance. It will apply in its full force, in all cases where a party procures a second insurance at an office whose rules allow such double insurance. Such second insurance would annul the previous policy." In *Stacey v. Franklin Insurance Co.*, *supra*, the court say: "If the plaintiffs failed to perfect their contract with the subsequent underwriters, by omitting to have the prior insurance allowed of and specified on the policy, as is required, it would be difficult to imagine in what way the prior insurance can be invalidated or affected. It is a vain, nugatory, and void act." As authority for this position, the case in 23d Pickering is cited.

The case of *Clark v. New England Mutual Fire Insurance Company*, *supra*, is decided on the authority of the two preced-

¹ *Ante*, vol. 1, 764.

² *Ante*, vol. 2, 108.

³ *Ante*, vol. 3, 131.

⁴ *Ib.* p. 671.

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ing cases. The learned judge, in his opinion in this case, elaborately reviews that of Judge Story in *Carpenter v. Washington Fire Insurance Company*, and endeavors to refute the conclusions therein arrived at. It is very apparent that the court in Massachusetts proceeds on the ground that the second insurance has been fraudulently obtained, if either from the fact of omitting to give notice of prior insurances, or by misrepresentation or any other fraud, it is void and inoperative; and that when the first insurer sets up as a defence the fact of subsequent insurance, it may be rebutted by showing that it was fraudulently obtained, and, therefore, void; thus, in effect, determining, in an action on the first policy, the validity of that issued by another company not a party before the court, and without any evidence that the underwriters do not concede its validity.

The supreme court of Maine, in the case of *Philbrook v. The New England Mutual Fire Insurance Company*, *supra*, have adopted similar views. In that case, the underwriters of the second policy paid the amount of the loss; thus directly affirming the policy, and admitting their liability upon it. Yet the court say, the fact that the company who issued the second policy paid the amount insured is of no consequence in the question here involved, if the payment was made on a policy clearly void. Whether the policy was not void, depended on the election and action of the underwriters. It was competent for them to waive, at any time, the forfeiture incurred by reason of the omission to give notice of a prior insurance, or of any fraud or misrepresentation existing at the time of the issuing of the policy. This waiver could as well be made after the loss as before, and payment of the loss is the best evidence that the underwriters of the second policy did, in fact, make the waiver. It was, therefore, a case where both parties treated the policy as valid and subsisting: the insured, by making the claim for the loss under the policy; and the underwriters, by admitting their liability and making payment. That policy was treated by the parties as a valid and legal policy, and effectual and binding upon the assurers. It came, therefore, directly within the class of policies referred to by the supreme court of Massachusetts in the case in 23 Pickering, and was, in this view, a second insurance. We adopt the language of the court in that case, and agree with them that "such second insurance would annul the previous policy." It is

difficult to withdraw the case now under consideration from the application of these principles. The plaintiffs in this case treated and claimed the Globe policy as a valid and legal policy, and binding on the assurers. They claimed their loss under it, and commenced and prosecuted an action for the recovery thereof. The Globe Company waived their right to avoid the policy, on the ground that they had received no notice of the prior policy, and admitted their liability upon it, and gave a draft for the amount of the loss. The policy has therefore been treated by both parties to it as legal and valid, and it clearly follows that, in fact, the plaintiffs had other and further insurance upon the same property as that covered by the defendants' policy. This second insurance was not notified to them, and by the terms of their policy it thereupon ceased and was of no further effect. In *Mellen v. The Hamilton Insurance Company*, 17 N. Y. 609, *ante*, this court had occasion to consider what was reasonable diligence in giving notice of a prior insurance, and the reasons why such notice is required. It was there said that if the only purpose for which notice of a subsequent insurance is required was that of enabling the prior insurers to ascertain for what proportion of a loss they might eventually be liable, no such notice would seem to be necessary until the actual occurrence of a loss; since, if given then, it would fully answer the purpose for which alone it was intended. But this is not the only nor, as we apprehend, the principal reason for requiring that express notice of every further insurance upon the same property shall be given. It was observed that of the facts to be communicated to an insurance company, there was probably none more important to be known than that of the total amount of the sums insured upon the same property, since it is by a comparison of this amount with the value of the property that prudent insurers, in making the election which the policy gives to them (to terminate or continue it), are certain to be governed. These views are in harmony with those already expressed, and furnish additional and conclusive reasons why the parties to this policy should be held to the stipulations contained therein, and which were voluntarily made, and for a laudable and proper purpose.

We are of the opinion that the judgment appealed from should be affirmed with costs.

SELDEN and WELLES, JJ., dissented. *Judgment affirmed.*

See *Lackey v. Georgia Ins. Co.* 42 Ga. 456, 459; *post*, vol. 5.

Promissory Representation.

JOHN HUTCHINS *vs.* CLEVELAND MUTUAL INSURANCE CO.¹
 (Supreme Court, Ohio, December Term, 1860.) *Ownership. — Misrepresentation.*

An application for insurance on a building against fire, which, by reference, was made part of the policy, contained certain interrogatories and answers, and among them, the following: "Do you own the land? Is it unincumbered by mortgage or otherwise?" "Yes." Previously to the issuing of the policy, the insured had executed a mortgage deed to a third person, to secure a large sum of money, which deed was then held by such person, and shortly thereafter duly recorded. *Held*, that the unrecorded mortgage was an incumbrance within the meaning and object of the inquiry, and the insured not having disclosed in his answer the existence of such mortgage, the policy was void.

NATHANIEL S. STIMPSON *vs.* MONMOUTH MUTUAL FIRE INSURANCE CO.²
 (Supreme Court, Maine, Kennebec, 1860.) *Action. — Assignment. — Notice of Loss.*

The insured assigned his policy to the plaintiff; the defendants ratified the same; and the plaintiff gave a new premium note. *Held*, that he could maintain an action upon the policy.

Notice of loss *held* good when written by an agent of the defendants at the request of the insured, though the fact of the request did not appear in the letter.

HANNAH MERRILL *vs.* FARMERS' & MECHANICS' MUTUAL Fire Insurance Co.³
 (Supreme Court, Maine, Cumberland County, 1860.) *Misrepresentation of Title. — Assignment.*

At the date of the policy in suit the title to the property was in a third person; the insured having from him simply a bond for title. The insured stated that she owned the property, and that there was no incumbrance upon it. *Held*, a material misrepresentation. *Held*, also, that this was a good defence to an action on the policy, though the policy had been assigned with the assent of the company; the assignment having been made in ignorance of the misrepresentation.

JOSEPH HERRICK *vs.* UNION MUTUAL FIRE INS. CO.⁴
 (Supreme Court, Maine, Waldo County, 1860.)

Promissory Representation.

A statement in an application (not directly responsive to any question) that the premises "will be occupied by a tenant" need not be fulfilled, even if a warranty, unless there is an increase of risk by the failure.

THE case is stated in the opinion.

RICE, J. In the argument before this court, reliance is only had upon the third specification of defence, which is in the following words: "The assured, in his application, which is made a part of the contract, stipulated that the house should be occupied; whereas the house was not occupied."

¹ 11 Ohio St. 477.

² 47 Maine, 379.

³ 48 Maine, 285.

⁴ 48 Maine, 558.

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The stipulation referred to, if it exist, is found in the application of the plaintiff for insurance. To the question, "Who owns and occupies the buildings?" the plaintiff answered, "Owned by the applicant; will be occupied by a tenant."

The application contains the following stipulation: "And I hereby covenant and agree to and with said company, that the foregoing is a correct description of the buildings and property requested to be insured, so far as regards the risk on the same." Does this constitute a warranty that the premises insured was and should continue to be occupied by a tenant? And if so, was the occupation material to the risk?

There is a distinction between a representation of an expectation, and the representation of an existing fact. The latter is in the nature of a warranty; the former does not amount to a warranty. *Rice v. N. E. M. Ins. Co.* 4 Pick. 439.

In *Catlin v. Springfield Fire Ins. Co.* 1 Sum. 434,¹ the words in the policy described the house insured as "at present occupied as a dwelling-house, but to be hereafter occupied as a tavern." It was held that this was not a warranty that the house should, during the continuation of the risk, be constantly occupied as a tavern; but that it is, at farthest, a mere representation of an intention to occupy it as such. Story, J., in his opinion in that case, says: "Suppose a policy against fire, underwritten on the house of A, in Boston, described as a dwelling-house, or as occupied as a dwelling-house, would the policy be void if the house should cease for a time to have a tenant? Such a doctrine has never, to my knowledge, been asserted, nor should I deem it maintainable."

The answer to the interrogatory manifestly shows that the house, at the time of the application, was without a tenant; and that it was the expectation or representation of the applicant that it should be occupied by a tenant and not by the owner. Nor can it fairly be construed to mean that it should be occupied by a tenant during the whole period of the risk.

But, even if it were a warranty that it should be occupied by a tenant continuously, it could not avail the defendants, because it does not appear that the risk has been in any degree increased by want of a tenant, and the applicant only covenants that his representation shall contain a correct description of the building to be insured, so far as regards the risk on the same.

¹ *Ante*, vol. 1, p. 436.

Indemnity. — Measure of Damages. — Repair.

As the case is presented, the defence fails, and a default must be entered. *Defendants defaulted.*

KENNEY, C. J., APPLETON, CUTTING, MAY, and KENT, JJ., concurred.

NOTE. — If the construction of the above answer be correct, there can be no doubt of the correctness of the decision, even regarding the answer as a warranty; which it seems to have been. In this view the statement was a warranty that it was the party's present intention to have the buildings occupied; and there was no evidence that this was not his intention. And as the answer was not in response to any question, it was

not perhaps wrong to consider that it was *ex gratia* merely, and not to be construed as a positive undertaking to have the premises occupied. Had the applicant been asked in his application *if he would have the premises occupied*, and his answer had been made a warranty by the policy, it is clear that it must have been fulfilled, in order to make the defendants liable. See *Stout v. City Fire Ins. Co.*, *post*.

HOPE MUTUAL INSURANCE CO. *vs.* BROLASKEY.¹ (Supreme Court, Pennsylvania, Philadelphia, 1860.) *Leasehold Interest. — Non-disclosure.*

A lessee of land for a term of years, with the right to remove the buildings to be erected thereon at the termination of his term, effected an insurance of the *buildings*, as the owner thereof; the policy contained a condition that, "if the interest in the property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." *Held*, that the insured being the absolute owner of the *buildings* had a right to insure them as such, and was not bound to disclose the extent of his interest in the land.

COMMONWEALTH INSURANCE CO. *vs.* SENNETT, BARR & CO.² (Supreme Court, Pennsylvania, 1860.) *Indemnity. — Measure of Damages. — Repair.*

Insurance is a contract of indemnity, in which the parties may stipulate for the manner in which that indemnity shall be made, and the time when it shall be valued; and when they do so, the law will carry out their contracts, as in other cases, if there be no fraud in either case.

Where an open policy of insurance specifies, that the damages are to be estimated at the "true and actual cash value of the property at the time the loss may happen," the measure of damages is that which was agreed upon by the parties, and it is error to allow the jury to adopt any other rule.

The privilege reserved by insurers to repair or replace the property destroyed is a reservation for the benefit of the company, which they may adopt or not as they think proper; and therefore the expense of repairing or replacing the property is not a proper rule for estimating the damages.

The fact that the property destroyed was patented cannot affect a contract to measure the damages by its value when the loss occurred.

¹ 35 Penn. St. 282.

² 37 Penn. St. 205.

What will avoid Policy. — Concealment and Alterations by Insured Party, etc.

GIRARD FIRE AND MARINE INSURANCE CO. vs. STEPHENSON.¹

(Supreme Court, Pennsylvania, 1860.)

What will avoid Policy. — Concealment and Alterations by Insured Party. — Opinion of Court as to Evidence.

In an application for an insurance, in which the location and description of the neighboring buildings was properly given (one of which was a carpenter shop), it was held that an omission to state that the shop was heated by stoves, or to say what provision was made for warming, was neither a fraudulent concealment of material facts, nor a breach of the covenants of the assured party; unless perhaps the heating was effected in an unusual and extraordinary manner.

In an action to recover for a loss by fire, which originated in an adjoining carpenter shop, the location of which was properly given in the application for the insurance, it is not error to permit the jury to decide whether stoves are customary and necessary in a carpenter shop, coupled with instructions that if not necessary and customary the plaintiff cannot recover.

Nor is it error in such a case for the court to permit the jury to decide whether the placing of a steam-engine in the shop, by which the stoves were superseded, had increased the hazard over what it would have been from the stoves alone, with the instruction that if it had done so, and the loss was the result of the change, the plaintiff must fail; but if not, the loss must fall upon the company, even though the fire may have originated from the engine.

Where an insurance policy provided that any alterations or repairs made in or about the insured property must be at the risk of the party insured, it was held that alterations or repairs did not *per se* avoid the contract, but only that the insured party should assume the hazard of their increasing the liability of the insurer.

A doubt expressed by the court in charging the jury, as to the legal effect which certain evidence might have had in a supposed contingency, which was not in the case as presented to the jury, is no cause for reversal or writ of error.

STRONG, J. The written application for the policy contained a provision that the representations made by the assured therein were given as a warranty, and the policy itself stipulated that the representations given in the application should be a warranty on the part of the assured, and contain a just, full, and true exposition of all the facts and circumstances, in regard to the condition, situation, and value of the property insured. Among the interrogatories propounded by the company, the answers to which make a part of the application, was the following: "State the distance to other buildings. For what are the nearest buildings occupied, and of what materials are they built?" To this the answer of the assured was: "Shop for carpenter on the west, distance twenty-five feet, not much used. No other buildings within two hundred feet on the same side of the street. One frame building on the other side of the street, distant eighty feet." The insured premises having been injured by fire, which

¹ 37 Penn. St. 293.

originated in the carpenter shop, the defendants set up, as a defence against their liability on the policy, that after it was signed the assured introduced a steam-engine into the shop, and used it in working lumber. On the trial of the cause in the court below, the jury were instructed, in answer to points propounded by the defendants, that the shop was a circumstance in the estimate of the risk taken by the underwriters, and that a voluntary enhancement of the risk by a change of the occupancy and use of the shop by the plaintiff himself would be a breach of the covenants of the policy on his part, and would prevent his recovery. They were also instructed that the covenants in the policy were to be construed with reference to the character of the risk taken, and if this was incompatible with the use of an engine and stove for working lumber in the shop by the plaintiff, it was an increase of risk and avoided the policy. That it made no difference as to the operation of the covenants of insurance that the shop stood on one lot, and the insured house on another, or that the assured had acquired the property from different owners. That, if the risk had been so changed, as to become one which the underwriters would not have taken without an increased premium, or would have refused it altogether, its voluntary enhancement by the plaintiff would prevent recovery. That if the assured obtained the policy under the representation that the shop would not be much used, and that no fire would be used in it, intending at the same time to occupy it permanently through the winter with a steam-engine and stove in which fires should be kept, it was a fraud upon the company and would avoid the contract. The court also instructed the jury that the setting of a steam-engine and use of the same in the shop was a change of the occupancy of the premises from the occupation stipulated in the application, and contrary to the covenants of the assured, if it increased the hazard and was the cause of the fire. Of all this the plaintiffs in error do not complain, nor could they. But they insist that the court erred in adding to these instructions the remarks, that "The shop belonged to the plaintiff (the assured) at the time when he made his application; and when this was laid before the officers of the company, their action would necessarily be predicated upon the information, the several answers to the questions just imparted, and they would naturally consider whether a stove was necessary to the proper use and occupancy

What will avoid Policy. — Concealment and Alterations by Insured Party, etc.

of a carpenter's shop; and this, we may suppose, would have had its effect upon the deliberations of the officers in taking or rejecting the application. One or two witnesses say there had been two stoves in the shop for heating it. Was this necessary or customary? If it was not, the plaintiff must fail; but if it was, then another inquiry arises whether the placing of the engine in the shop, by which the use of the stoves would be superseded, increased the hazard over what it would have been from the stoves alone. If it did, and the loss was the result of the change, the plaintiff must fail. But if it superseded the stoves for heating, and was used for other mechanical purposes, but did not increase the hazard to any extent, the loss would fall on the company, although the fire may have originated from the engine."

I have quoted these assignments of error at length, in connection with the other instructions given to the jury, that their true bearing upon the case may be understood. The grounds of defence in the court below then not sustained by the charge of the judge were, that the representations in the application had not fully stated the circumstances material to the risk, in that there was no information given that there was a stove in the carpenter's shop, near the insured premises, and that the hazard had been increased by the voluntary act of the plaintiff. The description given of the neighboring building was a shop for a carpenter, not much used. Was it, then, a fraudulent concealment, or a breach of the assured's covenants, that he did not state that the carpenter's shop was heated, and what provision was made for warming it? If, instead of being a carpenter's shop, the adjacent building had been a dwelling-house, would he have been under obligation to state that there were stoves in that dwelling-house? And if he had neglected to do so, would his neglect have avoided the policy? A representation that a carpenter's shop stood twenty-five feet from the insured premises informed the insurers that what is commonly understood by such a shop, what ordinarily constitutes it, and what belongs to its use, was there. If there had been anything extraordinary in the manner of its being used or heated, anything which increased the risk of fire, it might have been his duty to communicate it specifically. But what is usual, what, in the language of the court below, is "customary" in such buildings, was communicated by the representation of the existence of the shop. In general,

What will avoid Policy. — Concealment and Alterations by Insured Party, etc.

the use even of the building insured, and how it is heated, need not be represented except in reply to inquiries. Phillips on Ins. 636, and cases there cited. That no more specific representations were contemplated by the parties is apparent from the interrogatories addressed by the company to the applicant for the policy. He was asked how the building proposed for insurance was warmed, and how lighted; but he was not asked how neighboring buildings were warmed and lighted, even though they entered into the estimate of the risk. The same particularity of description was not required in regard to the latter as in regard to the former. The court then committed no error in permitting the jury to inquire whether stoves were necessary and customary in carpenters' shops, and in holding that, if they are, the representation sufficiently informed the company that the risk which they took might be effected by stoves in this carpenter's shop. And if the jury found that the use of stoves in such a building is an ordinary and customary use, and consequently that the plaintiff, by not having specifically mentioned that they were used in this adjacent shop, was guilty of no fraudulent concealment, or breach of his warranty, then the risk undertaken by the defendants embraced the hazard consequent upon the presence and use of stoves there. That hazard the plaintiff might increase, and still avail himself of his policy. The court submitted to the jury to find whether he had increased it, whether the substitution of a steam-engine for the stoves enhanced the risk; instructing them that if it did, the plaintiff could not recover, and if it did not, he could. In this we see nothing erroneous. Whether the risk was increased or not is a question for the jury, not the court. *Grant v. How. Fire Ins. Co.* 5 Hill, 10.¹ The representation, even though it be made a warranty, does not bind the assured that there shall be no alteration, however immaterial to the risk, in the thing insured, or in its use. Although a strict and literal compliance with the terms of warranties be necessary, still the warranty is construed according to its ordinary meaning. *Shaw v. Robberds*, 6 Ad. & Ellis, 75.² While the risk is running, the assured can make no substantial alteration which enhances the liability of the insurer. But what is a substantial alteration? In fire insurance it would seem to be, mainly, an increase of the risk. *Stetson v. Ins. Co.* 4 Mass. 330. It was

¹ *Ante*, vol. 2, p. 266.² *Ante*, vol. 1, p. 621.

one of the conditions of the policy on which this suit was brought that any alterations or repairs made in or about the premises (insured) must be at the risk of the assured; not that they should necessarily avoid the contract, but that the assured should assume the hazard of their increasing the liability of the insurer.

The only remaining assignment of error is founded on what the court said in regard to a portion of the evidence. It was as follows: "Evidence, however, was received of the conversation that occurred between the agent of the company and the plaintiff, at the time the application for insurance was made, in which the latter said that he expected to be from home much of the time, and that the shop would be but little used, though he 'might want to use it some, and that no fire would be in it.'" But this was not communicated to the officers of the company, though it was that the insurance would be in the farmers' class of hazard, by which the premium would be considerably less than if in another class, and could not, therefore, have served as an item of consideration in the taking of the risk. Had the officers been informed of the conversation, and it had formed to any extent an inducement to the risk, a different aspect might be given to the case. But even this might be questionable, as it would be outside of what was written, and proved the basis of the contract between the parties."

Certainly, if this conversation was not communicated to the company, it could have had no influence in inducing them to enter into the contract. The agent did, however, inform the company that it was a farmer's risk, but he did not testify that the information was given in consequence of anything the plaintiff said. On the contrary his testimony was, as appears by the judge's notes, that it was not on that account he made the communication. He testified: "I communicated to the company it was a farmer's risk, — *that there were no contiguous buildings*, — but nothing of the conversation I had with the plaintiff." . . . "The shop, without fire in it, would exempt the house from the farmers' rates, which do not allow other buildings within eighty feet." It was the distance of neighboring buildings then, and not the fact that they have no fire in them, which determined whether the risk was a farmer's risk or not.

The plaintiffs in error, however, complain that the court expressed doubts whether, if the conversation had been commu-

Occupation of Premises.

nicated to the company, it would have made any difference, because it was outside of the written basis on which the parties contracted. If it could have had any effect in the supposed case, it would be, not because the declarations of the plaintiff were fraudulent concealment, or misrepresentation, but because they amounted to a promissory representation broken by him, — a representation in addition to those contained in his written application. But, by the provisions of the policy itself, the addition of a parol promissory representation appears to be prohibited, and the rights of the parties made to depend upon the written contract alone. How this may be, it is unnecessary to inquire; for the question is not in the case. The supposed case has no existence here, nor was it submitted to the jury; and, consequently, any doubts expressed by the court below in regard to it could not have been hurtful to the plaintiff in error.

None of the errors assigned are sustained, and the

Judgment is affirmed.

MCANNALLY, for use, etc. vs. SOMERSET COUNTY MUTUAL
INSURANCE Co.¹

(Supreme Court, Pennsylvania, 1860.)

Occupation of Premises.

Where the provision of a policy of insurance was that "if any change be made as to the tenants or occupancy of the premises without being notified to the company and indorsed upon the policy, then this instrument to be void." *Held*, that if the persons who occupied the premises at the time of the execution of the policy left a short time before the fire, leaving them unoccupied at the time of the fire, it was not necessary that the assured should have given the company notice that the tenant had left, in order to hold the company liable.

THE opinion of the court was delivered by

STRONG, J. The controversy in this case arises out of a provision in the application which, by the policy, is declared to be a part thereof. The provision is as follows: "But if any untrue answer has been given to the foregoing interrogatories, whereby the said company have been deceived as to the character of the risk, or if any change be made as to the tenants or occupancy of the premises without being notified to this company and indorsed upon their policy, then this instrument to be void and the policy of no effect."

The fire took place on the 20th of April, 1857, and at that

¹ 2 Pittsb. 189.

Occupation of Premises.

time the property insured was untenanted. The person who had occupied it had left a short time before, how long does not appear, and no new tenant had taken his place. The court below was of opinion that this amounted to a change "as to the tenants or occupancy," within the meaning of the policy, and instructed the jury that no evidence of notice of the change had been given. The jury were, therefore, directed to return a verdict in favor of the insurers. Herein we think there was error.

If a failure to give notice to the company that the tenant had left the premises could be held to be a breach of the conditions of the policy, and if it rendered the policy of no effect, still the court was mistaken in withdrawing from the jury the question whether notice had not in fact been given. There was evidence from which they might well infer it. E. W. Hall, one of the witnesses, testified that at the time of the arbitration, Hicks, who was the secretary of the company, "admitted that the plaintiff had given notice at one time, at Fichtner's, that the tenant had left the house." Another witness proved that "there was a controversy between McAnnally and Hicks as to the place where he was notified about the tenants leaving; that Hicks admitted he was notified at one place, but which one he could not state." The testimony of a third witness was, that after the fire Hicks expressed to McAnnally regret for the loss, and promised to try and give him the money when the loss should be appraised. No complaint was made of any default on the part of the assured. Surely, from all this the jury might have presumed that notice had been given before the fire had occurred. Yet the court withdrew the question entirely, holding that there was no evidence at all of such notice. This, however, is of comparatively small importance, for we are of opinion that McAnnally was not bound to give any notice that the tenant had left, in order to hold the company liable. A mere surrender by one tenant, without the entry of another, is not a change "as to the tenants or occupancy of the premises," within the meaning of the policy. To give it such a construction would be unreasonable. Then it would demand that if a tenant went out, and resumed his tenancy after two days' absence, notice should be given of his going out, and a second notice of his return. A change of tenancy or occupancy is a substitution of one tenant or occupant for another. A change in the nature of occupation was provided for in another part of this

Evidence. — Assignment. — Incumbrances. — Other Insurance, etc.

policy, and all that the provision now under consideration means is, that if a new occupant comes in, instead of the former, notice of the fact shall be given to the company. If the insurers had intended to secure relief from liability in case the premises should be left temporarily vacant without notice to them, it would have been easy to find words to express such intention. No such intention is fairly deducible from the words which they have used.

It follows that the court erred in the construction they gave the policy and in directing the jury to find for the defendant.

Judgment reversed and a venire de novo awarded.

LYMAN NICHOLS & others vs. FAYETTE MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861.)

Evidence. — Assignment. — Incumbrances. — Other Insurance. — Three Fourths Clause.

Proof of an application for insurance and of a policy issuing thereon, both of which describe the property insured as property of the plaintiffs, is *prima facie* evidence of title and of an insurable interest in the plaintiffs, in an action upon the policy.

When one of the plaintiffs has taken an assignment of a first mortgage on the insured property, in trust for all the plaintiffs, and has completed a negotiation for the purchase of the interest of the mortgagee in a second mortgage, under which the title has been perfected by a foreclosure, a statement by the plaintiffs in the application for insurance that they are mortgagees in possession will not avoid the policy.

When an applicant for insurance has answered a question in the application as to the existence and amount of incumbrances upon the property by saying that incumbrances exist, without stating their amount, the issuing of the policy is a waiver of any objection to the answer on the ground of insufficiency ; and the whole amount of incumbrance is immaterial if the plaintiffs are in possession under a first mortgage, which is for a greater sum than the amount of the insurance.

The fact that a third person, interested in the property, has previously obtained insurance in the name of the plaintiffs, but without their knowledge, will not avoid a policy, although the by-laws annexed thereto provide that if a previous policy exists and is not disclosed the policy shall be void.

When a policy recites that the amount insured is not more than three fourths of the value of the property, "as appears by the proposal of the insured," and the application of the insured contains a valuation of the property, the policy is a valued policy.

CONTRACT on two policies of insurance dated September 19, 1857. The first policy insured the plaintiffs in the sum of \$600 on their shop and dwelling-house in Methuen ; and the second in the sum of \$1,000 on their dwelling-house in the same town. The plaintiffs claimed for a total loss, and the fact of the loss, within the time covered by the policy, was not denied ; but it was denied that the plaintiffs had any insurable interest in any part of the

¹ 1 Allen, 63.

property described. At the trial in this court the plaintiffs introduced in evidence the two policies and applications, and there rested, claiming that they had made out a *prima facie* case under the pleadings; and Metcalf, J., so ruled. The policies and applications described the property insured as property of the plaintiffs; and, in reply to question 10 in both applications, "Is it incumbered, and if so for what sum?" the plaintiffs answered, "Applicants are mortgagees in possession. Other incumbrance exists." Both applications also contained a valuation of the property described; and both policies contained the following language: "The amount insured being not more than three fourths the value of said property, as appears by the proposal of the said assured."

The defendants contended that the above answer to question 10 contained a material misrepresentation of the title to the premises, and introduced evidence as follows: 1. A mortgage of the premises insured, with other property, from Alonzo Waldo to Charles Waldo, dated May 4, 1837, to secure a note of \$11,500 of the same date. Charles Waldo commenced an action to foreclose this mortgage in 1849, which was continued until December, 1859, at which time conditional judgment was entered for \$27,000. The value of the whole property covered by this mortgage, at the time of the insurance, did not exceed \$11,000. 2. A mortgage of the premises insured, with other property, from George A. Waldo to Thomas P. Rich, dated September 25, 1847, to secure a note of \$5,000 of the same date. Rich made an entry, for the purpose of foreclosure, July 1, 1850, which was recorded July 8, 1850; and another entry for the same purpose, in the presence of witnesses, February 3, 1851, which was recorded February 7, 1851. The value of the whole property covered by this mortgage, at the time of the insurance, did not exceed \$8,000. 3. A deed of the premises insured from G. A. Waldo to the plaintiffs, dated September 25, 1848.

The defendants offered to prove certain false declarations of the plaintiffs, made at the time when the policies were issued, relative to their having bought up the incumbrances upon the property; but the evidence was rejected. The defendants also offered to prove that Thomas P. Rich effected an insurance in the name of the plaintiffs upon the same property, which insurance was in force at the time of the loss, and that Rich had received

upon his policy the sum of \$1,500. One of the by-laws annexed to the present policy was as follows: "All applications for insurance will state whether there be a previous policy on the property insured. If a previous policy exists, and is not disclosed, the policy in this company will be void." There was in each of the applications a printed question inquiring for existing insurances upon the premises, to which no answer was made. As there was no offer to prove that the plaintiffs knew of the existence of the insurance by Rich at the time of their application to the defendants, the court rejected the evidence.

The fact having been elicited on cross-examination that Jacob W. Pierce, one of the plaintiffs, paid Rich \$1,000 in April, 1857, upon a certain agreement between them, the plaintiffs were allowed, under objection, to prove the agreement by a letter from Rich to Pierce, and a receipt, which were as follows: —

"Boston, March 17, 1857. Dear Sir, — I understand your offer to be — You will give me one thousand dollars, cash, for my claim against G. A. Waldo's estate, and I am to transfer all my right and title of the same to you. You further, in consideration of this transfer, agree to give me your obligation and bond to divide with me *pro rata* all you may realize from the estate, reckoning our several claims from the dates thereof, interest on the same, and all expenses each has incurred upon them.

"You are to prosecute the claims to their settlement with all other claimants upon the estate, at the expense of estate, or at your own expense, should you not succeed in recovering anything. It is understood I am never to be called upon, in any case, for any expense you may incur in the accomplishment of the above. But you are to confer with me on the best manner of disposing of the property, and to have my concurrence in the same. I accept your proposal on above terms.

"Yours truly, Thomas P. Rich.

"Mr. Jacob W. Pierce, 27 Commercial Street."

"\$1,000. Boston, April 18, 1857. Received of Mr. J. W. Pierce one thousand dollars on account of the Geo. A. Waldo affair, in conformity with my letter to Mr. Pierce of March 17, 1857, and as a voucher of his assent to the same.

"Thomas P. Rich."

The plaintiffs then introduced in evidence, under objection, an assignment of the first mortgage above named by Charles Waldo

to Jacob W. Pierce, dated March 19, 1857; another assignment of the same by Waldo to Isaac D. Farnsworth, dated June 17, 1857; and another assignment of the same by Farnsworth to Pierce, dated December 7, 1859. These several assignments are more fully referred to in the opinion of the court. The plaintiffs also introduced evidence, under objection, tending to prove that, at the time of the execution of the deed from George A. Waldo to them, they executed an agreement for the reconveyance of the same; but this evidence, and the questions growing out of it, became immaterial in the final determination of the case.

Upon all the evidence, the judge ruled that the policies were valued policies, and that the plaintiffs were entitled to recover; and a verdict having been rendered accordingly, the defendants alleged exceptions.

CHAPMAN, J. At the trial of the cause, the presiding judge ruled that the plaintiffs had made a *prima facie* case, though they had offered no evidence of their title to the property insured. This ruling is objected to. It became immaterial, because the title appeared in the course of the trial by undisputed evidence. But the court are of opinion that in mutual insurance the representations of the assured, in respect to the title, stand upon the same ground with the other representations. The policy may be avoided by proving their falsehood in any material part; but the legal presumption is that they are true. The ruling was therefore correct. See the opinions of Strong, J., in *Fowler v. New York Ins. Co.* 23 Barb. 150.

In the application, certain questions are answered respecting the property. Question 10: "Is it incumbered? If so, for what sum?" Answer: "Applicants are mortgagees in possession. Other incumbrance exists." It is objected that this answer contains a material misrepresentation. Whether this is so depends upon the true state of the title. At the time of the application, September 19, 1859, the property had been mortgaged as follows: To Charles Waldo, May 4, 1837, with other property, for \$11,500; to Thomas P. Rich, September 25, 1847, for \$5,000; to the plaintiffs, September 25, 1848. A question was raised at the trial as to the admission of evidence tending to prove a defeasance, the deed of the plaintiffs being absolute on its face; but the opinion of the court makes that evidence immaterial. Rich made two entries to foreclose his mortgage; one in 1850, the

other in 1851. Under the last entry his foreclosure was perfected; and it is immaterial whether the first was perfected or not. The plaintiffs' title was extinguished by the foreclosure in 1854, though both the plaintiffs and Rich did several acts afterward tending to show that both parties believed that this mortgage was not foreclosed. The defendants offered evidence that Rich, in October, 1856, obtained insurance on the buildings in the plaintiffs' name, though without their knowledge.

In this state of things, the plaintiffs negotiated with Charles Waldo, and obtained from him an assignment of his mortgage, March 19, 1857. This was made to Pierce, one of their firm, but was paid for by their joint funds. They were then negotiating with Rich for the purchase of his interest. Two days before, he had written Pierce a letter agreeing to sell him his interest for \$1,000 cash, and a further contingent sum, depending on the price which should be obtained on a sale of the land. It was to be a *pro rata* share on all the mortgages, thus admitting the validity of all. On the 18th of April the \$1,000 was paid him by the plaintiffs. From this time the title stood as follows: The legal title as mortgagee was in Pierce, in trust for the other plaintiffs and himself. The right of possession followed, and there is no pretence that Rich ever interfered with it afterwards. A suit had long been pending to foreclose the Charles Waldo mortgage, and was afterwards prosecuted to judgment, apparently because the parties supposed the Rich mortgage had not been foreclosed, and that there was an equity of redemption still existing in some person. In June, the plaintiffs took a second assignment to Farnsworth, their clerk; but it was inoperative, as the title was already in Pierce.

The court are of opinion that, the plaintiffs being in possession, and Pierce being the legal assignee of the mortgage, in trust for them all, the answer contained no misrepresentation that should avoid the policy. The lien of the defendants on the property insured was as perfect as if all had been assignees of the legal title. The answer that other incumbrances existed was true. It is objected that the answer was insufficient, because it did not state the incumbrances more fully; but it is settled that the issuing of a policy upon the representations made is a waiver of such an objection. *Hall v. People's Ins. Co.* 6 Gray, 185, *ante*; *Allen v. Charlestown Ins. Co.* 5 Gray, 389, *ante*; *Liberty Hall Association v. Housatonic Ins. Co.* 7 Gray, 261, *ante*.

 Authority of President.

The defendants' position, that they were deceived and defrauded because of the great amount of the mortgages is untenable. It is based on the idea that the plaintiffs were in possession under their own mortgage only, and subject to the mortgages of Rich and Charles Waldo. If this had been so, and their insurance had been upon their interest under a third mortgage, the objection would have had force. But as they were in under the first mortgage, which gave them an unincumbered interest several times greater than the amount of the insurance, the amount of the mortgages was not material. The insurance had relation to the value of the buildings, and not to the cost of the whole property. The state of the title, as admitted by the parties, makes the parol evidence which was offered by the defendants to prove fraud wholly immaterial. The fact that Rich obtained insurance on the property in the name of the plaintiffs, and without their knowledge, was equally immaterial, because it could not prejudice their claim.

It was correctly ruled that this was a valued policy. It was such in the sense in which that term is applied to policies of fire insurance. *Borden v. Hingham Ins. Co.* 18 Pick. 523; *Fuller v. Boston Ins. Co.* 4 Met. 206; *Holmes v. Charlestown Ins. Co.* 10 Met. 211; *Phillips v. Merrimack Ins. Co.* 10 Cush. 350.

Upon these principles and the admitted facts, the jury were properly instructed that the plaintiffs were entitled to recover.

Exceptions overruled.

 SARAH BAXTER vs. CHELSEA MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861.)

Authority of President.

The president of a mutual insurance company whose by-laws provide that no policy shall be delivered until after payment of the premium, and whose directors have voted that if premiums are not paid within sixty days from the dates of the policies, the policies shall be considered as cancelled, has no authority to waive these provisions; and such insurance company is not bound by assurances given by him to a mortgagee that a policy has been procured by the owner of the mortgaged property, and made payable to the mortgagee in case of loss, when in fact such policy has not been delivered in consequence of a failure to pay the premium.

CONTRACT. At the trial in this court the plaintiff offered to prove that heretofore the defendants had duly issued to George W. Gerrish a policy of insurance on his brick dwelling-house in

¹ 1 Allen, 294.

Authority of President.

Chelsea, which policy, with the consent of the defendants, had been assigned to her as mortgagee; that a short time before the policy expired, the president of the company made an oral agreement with Gerrish to renew it, making it payable in case of loss to the plaintiff as mortgagee; that in pursuance of this agreement a policy was so made out, dated March 1, 1857, and signed by the proper officers of the company, but never delivered, the premium not having been paid nor a deposit note given; that the president and secretary of the company, several times before the fire, which occurred June 9, 1857, requested Gerrish to pay for and receive the policy, to which he replied substantially that he would do so soon, but neither the president nor the secretary ever told him that the policy would be cancelled if he did not do so; that after the agreement between Gerrish and the president of the company, and before the fire, the plaintiff's agent called upon the president and inquired if the policy had been renewed and made payable to the plaintiff, to which the president replied that the policy was renewed and she was insured, and she need not give herself any concern about it; that the president then knew that the policy had not been delivered nor the premium paid; that by this reply the plaintiff was induced to believe that she was insured, and otherwise would have obtained insurance upon the property in some other company; that Gerrish had procured many policies of insurance of the defendants, some of which had been delivered to him after the expiration of sixty days from their date upon the payment of the premium, and in some instances upon giving his note for the premium, and the defendants had never objected so to deliver policies, merely on account of the lapse of time, when no fire had occurred; and that shortly after the fire Gerrish called upon the secretary of the company, asked for the policy, and tendered the premium and deposit note therefor.

Gerrish was one of the directors of the company, and, before the transactions above mentioned, had united with the other directors in passing a vote that the premiums on all policies should be payable within thirty days from the date of the policies, and if not paid within sixty days the policies should be considered as cancelled; but neither the plaintiff nor her agent knew of this vote till after the fire. The following were among the by-laws of the company:—

Authority of President.

"Art. 20. Each person, or company, by its agent, upon the execution of his, her, or their policy, or policies, and before the same shall be delivered, shall pay such premium, and give such note for deposit, as the president and directors shall, from time to time, determine.

"Art. 22. These regulations may be altered at any annual meeting, or at any legal meeting of the company called for that purpose, by the vote of the majority of the members present."

No facts as to the fire or proof of loss were in dispute; and Hoar, J., ruled that the plaintiff was not entitled to recover, and a verdict was taken for the defendants, subject to be set aside, or judgment to be entered thereon, as the court should order.

CHAPMAN, J. All but one of the questions raised here have been decided in the recent case of Brewer against these defendants, 14 Gray, 208. In that case it appeared that Gerrish had taken the same steps towards obtaining insurance that he has done in this case, and that they were held to be insufficient. The plaintiff in that case was his mortgagee, to whom the policy was to be made payable in case of loss. It was there held that the president was but a special agent of the company, and could not by his agreements effect insurance on terms forbidden by the by-laws. He had in that case made the same agreement with Gerrish that he did in this case. But the plaintiff proved in the present case that she sent a person to the president to inquire about the matter; and the president, in reply to her agent, represented that Gerrish had obtained the insurance. It is contended that the defendants are estopped to deny the truth of this representation. But the obvious answer to this is, that the president could no more bind the company by his representations beyond the scope of his authority than by his agreements.

It is urged that such a decision will tend to embarrass the business of insurance, because much insurance is necessarily effected by agreements which are to take effect before policies can be made. The answer to this suggestion is, that mutual insurance is essentially different from stock insurance. Much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business, and great

By-laws. — Proofs of Loss. — Knowledge of Agent.

abuses have grown out of the undue extension of their business. They need many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself. Before he has a right to hold them responsible, he must, of necessity, have his contract completed; and it is important, in this species of insurance, that he should make himself carefully acquainted with its terms. Parties who cannot attend to this should obtain insurance of stock companies, or bear their own risks.

Judgment on the verdict.

MARTIN L. SMITH & another vs. HAMILTON MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861)

By-laws. — Proofs of Loss. — Knowledge of Agent.

If an application for insurance contains an agreement that the assured will be "bound by the act of incorporation and by-laws of the company," and the policy issuing thereon recites that the company will be liable "according to the true intent and meaning of said act of incorporation and by-laws," and refers to the application as binding upon the assured, under the limitations and conditions expressed in the by-laws, the assured must comply with the conditions of the by-laws relative to giving notice and making proof of loss; and if the by-laws provide that every one sustaining loss "within thirty days shall file with the secretary a particular account of the amount," &c., the omission to do so for seventeen months will discharge the policy.

An omission to give notice and make proof of loss, in compliance with the requirements of the by-laws of a mutual insurance company, is not waived by a statement of the president of the company, made seventeen months after the loss, that the company would be disposed to do what was right, that they knew at the time of the fire that it was their loss, and were surprised that they were not notified; or by a subsequent direction from the directors of the company to one of the assignees in insolvency of the assured, in reply to a verbal claim of loss made by him, to have a statement of loss sent to them, and they would take the subject into consideration; or by a subsequent vote of the directors to require the assured to make a statement under oath in regard to the loss.

Knowledge by an agent of a mutual insurance company of a fire by which a loss occurred does not relieve the assured from the duty of giving notice and making proof of loss, according to the by-laws.

CONTRACT upon a policy of insurance issued by the defendants to the firm of M. & J. Ricker, of whose estate the plaintiffs are assignees in insolvency. The answer denied that the plaintiffs had given notice and made proof of loss, according to the by-laws, by which the assured were bound.

At the trial in this court, before Merrick, J., it appeared that

¹ 1 Allen, 297.

the application for insurance was filled out in the name of Nahum Stone, and his name was upon it as "agent." This application contained a clause as follows: "In case of insurance, he (the applicant) holds himself bound by the act of incorporation and by-laws of the company." It appeared that the application was signed by the assured, delivered to Stone, who forwarded it to the defendants, and received in return the policy in suit, which he delivered to the assured. The policy was for one year from the 1st of October, 1855, and contained the following clauses: "to which (*i. e.* to the application) reference is to be had in explanation of this instrument, and by which the said assured is bound, under the limitations and conditions expressed in the by-laws aforesaid." "Now, know ye, that the absolute and conditional funds of the said company are hereby bound and subjected to satisfy and make good unto the said assured, his heirs, executors, administrators, or assigns, all the loss or damage by fire which may happen to the said insured property, within the time aforesaid, according to the true intent and meaning of the said act of incorporation and by-laws." The tenth article of the by-laws was as follows: "Every member sustaining loss by fire shall forthwith give notice thereof to the company, and within thirty days shall file with the secretary a particular account of the amount of his loss, and the whole value of the property insured at the time of such fire." "And unless such proofs, declarations, and certificates shall be produced within said thirty days," "the losses shall not be payable." "Any loss not claimed within said thirty days shall not be paid, unless by consent of two thirds of the directors."

Upon the book of records of the directors of the company a vote was recorded, before the time of issuing the policy in suit, appointing Stone as an agent; but there was no proof of the nature of his agency except his acts of receiving and transmitting the application and policy in the present case. The property insured was destroyed by fire on the night of August 3, 1856; and at this time Nahum Stone lived within a few hundred feet of the place where it was situated. No notice of the loss was given to the defendants, or to any of their agents or officers, until January, 1858.

M. & J. Ricker afterwards went into insolvency, and, in December, 1857, the plaintiffs were chosen assignees. About the

By-laws. — Proofs of Loss. — Knowledge of Agent.

1st of January, 1858, Smith, one of the plaintiffs, saw the president of the company, and told him the reason why the notice and proof of loss had been omitted, to wit, that the Rickers had another policy, which they looked at by mistake, and found that it had expired; and the president replied that the company would be disposed to do what was right; that they knew at the time of the fire that it was their loss, and were surprised that they were not notified, and asked him to go before the directors. He went before the directors, and they directed him to have the Rickers send to them a statement of the loss, and they would take the subject into consideration; but made no promise of payment. The statement of loss was sent accordingly.

A copy of the records of the directors of the company was put in evidence, as follows: "Action of the directors of the Haverhill Fire Insurance Company in case of M. & J. Ricker. Full board of directors, thirteen. January 11, 1858. Voted, that M. & J. Ricker, of Cambridge, be required to make a statement under oath in regard to loss and damage by fire to property insured by policy No. 8255. Nine directors present." After several meetings in which this claim was considered, it was voted, May 10, 1858, not to pay it; and the plaintiffs were notified thereof.

The court directed a verdict for the defendants, with the agreement that the case should be reported for the consideration of the full court.

BIGELOW, C. J. This is a very plain case. The plaintiffs claim in the right of the original assured, and are bound by all the stipulations contained in the contract of insurance. By the tenth article of the by-laws it is provided that the assured shall within thirty days, after a loss by fire, file with the secretary of the company a particular account of the amount of his loss, the value of the property insured at the time of the fire, and his interest and title therein. It is also further provided by the same by-law that, unless such proofs and declarations are filed within thirty days, losses shall not be payable. The policy was clearly made subject to this by-law. Not only did the assured in the application which is referred to in the policy agree to be bound by the by-laws, but the promise of the defendants was to indemnify the assured "according to the true intent and meaning of the act of incorporation and by-laws."

It is not pretended that the provisions of the by-laws were

Title. — Misrepresentation. — Claim for Total Loss.

complied with by the assured. No notice of the loss was given to the company until nearly a year and a half after the fire. By the terms of the contract, therefore, the loss was not payable.

There was no sufficient evidence of a waiver of this provision in the by-laws by the directors of the company, nor of any consent to the payment of the loss by two thirds of the directors, according to the stipulations in the same article of the by-laws. All the facts show that the defendants stood on their rights, and never intended to yield anything in the negotiations which they had with the plaintiffs. After so long a lapse of time between the occurrence of the fire and the notice of the loss, very strong evidence of waiver would be necessary. During this interval of time many old members of the company must have ceased to be associates, by the expiration of their policies, and many new ones had doubtless come in. Under such circumstances, therefore, it is difficult to believe that the directors would consent to admit their liability for a loss from which they had been discharged by the laches of the assured, and which, if allowed, would essentially affect the interests of their policy holders. This view of the case renders it unnecessary to decide whether the directors had power to waive the provisions of the by-laws relating to the notice of loss. See *Hale v. Mechanics' Ins. Co.* 6 Gray, 173, *ante*; *Baxter v. Chelsea Ins. Co.* 1 Allen, 294, *ante*. *Judgment on the verdict.*

THOMAS B. WYMAN & wife vs. PEOPLE'S EQUITY INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861.)

Title. — Misrepresentation. — Claim for Total Loss.

An application by a mortgagee in possession for insurance "on dwelling-house," which contains no direct question or statement as to his title; but, in reply to a question as to incumbrances, states as follows: "First mortgage to M. W. (the name of the plaintiff), entered October, 1855;" and, in reply to a question, whether the property is insured, states as follows: "Not on first mortgagee's interest;" does not disclose such a want of true representation of the title of the applicant as to avoid the policy, although the by-laws require him to state his true title.

A notice to an insurance company claiming for a total loss of a wooden dwelling-house, without mentioning the stonework and bricks which were left unconsumed, is a sufficient compliance with a by-law which requires the insured, in case of partial loss, to state the amount of damage done, and the value of such parts as remain.

CONTRACT upon a policy of insurance. At the trial in this court, before Hoar, J., it appeared that in the application, dated

¹ 1 Allen, 301.

October, 5, 1857, Mary Wyman, the female plaintiff, requested insurance in the sum of \$1,500 "on dwelling-house" in Quincy, valued at \$2,500, and built of wood. The application contained the following questions and answers: "10. Is the property incumbered, and to what amount?" Ans. "First mortgage to M. Wyman, \$1,500 (entered October, 1855). Second mortgage to Joseph Hunt, \$1,200, May 16, 1854, 3 years. *Vide* Norfolk Deeds, vol. 231, p. 131; vol. 226, p. 311." "11. Is the property insured?" Ans. "Not on first mortgagee's interest; not known to be by any other concern." The promise of indemnity in the policy was made "subject to the provisions and conditions of the charter and by-laws of said corporation." The policy also stated that the company would rely upon a lien on the property covered by it, to secure the payment of assessments which might be made.

Article 17 of the by-laws, annexed to the policy, was as follows: "Any policy issued by this company shall be void, unless the true title of the insured in the property be expressed in his application for insurance." Article 14 required the insured, in case of loss, to "deliver to the president or secretary a particular account in writing under oath, stating the value of the property lost, the nature and value of his interest therein, and, if a partial loss, the amount of damage done," "and the value of such parts as remain;" and provided that the insurance should not be payable until this was done. The property insured was destroyed by fire on the 27th of August, 1858; and the female plaintiff gave seasonable notice thereof to the defendants, stating that the property was at that time consumed by fire, and was a total loss; that the estimated value thereof was \$2,500; and that her title was that of holder of a mortgage thereon of \$1,500, on which she had taken possession, for the purpose of foreclosure, on the 18th of October, 1855. The defendants contended that this notice disclosed a want of true representation of the title of the assured in her application; and that it did not comply with article 14 of the by-laws, because it claimed a total loss, without allowing for the value of the stonework of the building, and of the bricks of the walls and chimneys, which were left after the fire. Evidence was taken of the value of these materials, and submitted to the jury, who found it to be \$108.75; but, under the instructions of the court, a general verdict was rendered for the plaintiffs, and the defendants alleged exceptions.

DEWEY, J. In defence of the present action two grounds are relied upon: 1. That there was in the application such a want of true representation of the title of the assured to the property as avoids the policy. 2. That the notice of the loss was not in accordance with the by-laws; and that, by reason of want of due notice, the right to maintain this action fails.

As to the first objection, it is not contended that there was any false representation, or any false answer given in response to any question in the series propounded by the company in the application. Had there been any such, under our decisions the policy must have been held invalid.

The sole question here is, whether this policy is void by reason of article 17 of the by-laws of the company, declaring "any policy issued by this company shall be void unless the true title of the insured in the property be expressed in his application for insurance." Corresponding with the provision, we might have expected to find some interrogatory put to the applicant, calling for an answer as to his title in the property. But such is not the case. The further inquiry then is as to the manner in which the title is stated, and whether the true title is not sufficiently expressed. The true title of the insured was that of a first mortgagee, for the sum of \$1,500,—the condition of the mortgage having been broken, and the mortgagee having entered for foreclosure two years previous to the making of the policy. It is to be remarked that the applicant nowhere describes the property as her own absolutely. The application is for an insurance "on dwelling-house."

In answer to the first inquiry bearing on the title (interrogatory 10), "Is the property incumbered, and to what amount?" the answer is: "First mortgage to M. Wyman" (the name of the plaintiff), "\$1,500, entered October, 1855." To the 11th interrogatory, "Is the property insured?" the answer is: "Not on first mortgagee's interest; not known to be by any other concern." These answers, taken in connection with the fact that there is no other statement of the interest of the applicant to control or modify it, or calculated to mislead, must be deemed to represent the interest of the applicant truly, and to apprise the company that she was not the absolute owner in fee simple. If they were not sufficiently full, it was the duty of the company to require further and fuller statements. Had the nature of the in-

Warranty. — Distance of Buildings.

terest been stated untruly, the by-law might properly be set up in bar of the plaintiff's right of recovery. But such was not the case, and this ground of defence must fail.

2. The objection to the form of the notice is then to be considered. The objection to this, as stated in the report of the case, is that a total loss was therein claimed, and no statement was made of the value or amount of the materials not destroyed by the fire, consisting of the bricks of the walls and chimneys and stonework of the building. We think the statement of the loss was sufficient; certainly so, if not objected to on that account and a more particular statement required. The notice stated that the building was consumed by fire on the 27th of August, 1858, and was a total loss. That was true; and the omission of the fact that the brick chimneys and the stonework of the building were not burned up, could hardly be said to mislead the insurers of a wooden building, as this was stated in the policy to be. It is said that article 14 of the by-laws required that the notice should state "the value of such parts as remain." We can hardly think this provision applicable to a case of entire destruction of the building insured, leaving nothing but bricks and stone, such as were left in the present case. But the entire features of the case show that it would have been entirely useless to the insurers to have had the statement as to these articles. The value of the building insured was \$2,500; the claim for insurance was \$1,500, which was the sum insured, and this sum was recoverable; and the fact that brick and stone to the value of \$108.75 remained unconsumed by the fire was wholly immaterial. We are of opinion that this defence, of want of more full statement of the value of the bricks and stone remaining after the building itself was totally consumed by fire, should not, under the facts found in the present case, avail the defendants.

Exceptions overruled.

SARAH H. TEBBETTS *vs.* HAMILTON MUTUAL INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861.)

Warranty. — Distance of Buildings.

If an application for insurance is expressly made a part of the policy, and a warranty on the part of the insured, and contains a clause inserted after the printed questions by which the applicant "covenants and agrees with said company that the foregoing is a

¹ 1 Allen, 305.

 Warranty. — Distance of Buildings.

correct statement and description of all the facts inquired for, or material in reference to this insurance," and the by-laws, which are also expressly made a part of the policy, provide that "unless the applicant for insurance shall make a correct description and statement of all facts required, or inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, the policy issued thereon shall be void," the applicant must be held to warrant that all facts inquired for are correctly given, whether material or not; and the omission to mention several buildings within one hundred feet of the property insured, in reply to a question, "What is the distance of said building from other buildings within one hundred feet, and how are such other buildings constructed and occupied? Annex a ground plan to the application;" will avoid the policy.

CONTRACT upon a policy of insurance. At the trial in this court, before Hoar, J., a verdict was returned for the plaintiff, and the defendants alleged exceptions. The facts are stated in the opinion.

HOAR, J. The application upon which the policy of insurance was obtained contained this interrogatory: "What is the distance and direction of said building (*i. e.* the building containing the property to be insured) from other buildings within one hundred feet, and how are such other buildings constructed and occupied? Annex a ground plan to the application." The answer was, "See diagram;" and a description of the neighboring property, containing these words, "East, Prescott Street." Prescott Street was laid down on the diagram. On the opposite side of Prescott Street, and within the one hundred feet, were several buildings, and among them three wooden carpenters' shops, which were neither represented on the diagram nor mentioned in the answer. The jury found that these buildings were not material to the risk; and the question presented for our decision is, whether the omission to disclose these buildings is a bar to the plaintiff's recovery upon the policy?

The application and the by-laws of the company are expressly made a part of the policy of insurance, a copy of the by-laws being appended to it; and the defendants rely upon the stipulations which they contain. By the 6th article of the by-laws, "the application upon which a policy is founded shall be held to be a warranty on the part of the assured, and as absolutely a part of said policy and of the contract of insurance, as if it were actually incorporated therein in full."

The 13th article of the by-laws provides that, "unless the applicant for insurance shall make a correct description of and statement of all facts required, or inquired for in the application, and also all other facts material in reference to the insurance or

Warranty. — Distance of Buildings.

to the risk, or to the value of the property, the policy issued thereon shall be void."

The application contains an agreement that every question shall be fully and distinctly answered; and at the end of it are these covenants, among others: "And the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for, or material in reference to this insurance." "The applicant further agrees that the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss."

It is also stipulated in the application, that "if any interrogatories are not fully answered in writing by the applicant, it is assumed that the facts in relation to them are *most* favorable to the title and to the risk, and they are so construed in writing the policy."

It is apparent, in the first place, that the answer to the interrogatory in the application does not "make a correct description of and statement of all facts required, or inquired for in the application." The interrogatory is not in terms confined to such buildings within one hundred feet as are material to the risk. It embraces all buildings within the distance named, and inquires as to their construction and occupation. It appears, therefore, that the defendants directly required the information included in the terms of the question. Whether a jury might think it material to the risk could be of no consequence, if the defendants chose to make it a condition of the validity of the contract. Although policies of insurance are to be liberally construed, and in such a manner as to secure, if possible, the protection which they are designed to afford, it is not in the power of the court to disregard stipulations which the parties have expressly made. And if, taking the whole instrument together, it is obvious that the defendants have made the strict and literal exactness of the answers to certain questions a condition of the contract, and a warranty on the part of the insured, they cannot be deprived of the advantage thus secured. They have a legal right to say, "We choose to determine for ourselves what is or is not material; and to base our contract upon such information as the insured is required to communicate in answer to specific interrogatories." *Davenport v. New England Insurance Co.* 6 Cush. 340.¹ *Miles v. Connecticut Ins. Co.* 3 Gray, 580.

¹ *Ante*, vol. 3, p. 129.

Warranty.—Distance of Buildings.

If the express warranty of the correct statement of the facts inquired for, according to the 13th article of the by-laws, were qualified by any other agreement or clause, as in the case of *Elliott v. Hamilton Ins. Co.* 13 Gray, 139, *ante*, so that we could find upon the whole instrument that the parties intended to limit the extent to which the insured should be held responsible for the accuracy of the answers given, we should gladly apply the rule of construction which that case declares. But the cases are wholly different. In that case the insured agreed that the description of the property contained in his answers was correct only so far as regarded "the condition, situation, value, title, and risk on the same." Here that agreement is omitted, and in its place is inserted the explicit and stringent covenant, that "the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for, or material in reference to this insurance." We think the only fair interpretation of this is, that the insured warrants that all the facts inquired for are correctly given, and all other facts material to the risk, even if not inquired for. The provision, that "the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss," cannot qualify the previous covenant, because it can have its full effect consistently with it. The answers might fail to give the information inquired for, and yet no material fact be misrepresented or suppressed. On the other hand, the answers might be complete and true, and material facts not embraced in the interrogatories might be incorrectly represented or purposely omitted.

The result to which we have come, upon this part of the case, renders it unnecessary to consider the other questions discussed in the argument, which arise on the report, and some of which are of considerable difficulty. The point decided is conclusive against the plaintiff's right to recover. The verdict must be set aside, and a

New trial granted.

NOTE. In *Tebbetts v. Hamilton Mutual Ins. Co.* 3 Allen, 569, Hoar, J., delivered the following opinion: "When this case was before us at a former term (*supra*), it was held that the plaintiff could not maintain her action, because the answers given by her to certain interrogatories in the application for insurance

were not correct, and their correctness was made by the policy essential to the validity of the contract. At the second trial she offered to show that she was induced to accept a policy containing such a condition, by the fraud of the defendants or their officers. But she sues upon the policy. It is the only contract she

Disclosure of New Facts.

has, and it is a conditional contract. If she was induced to take such a contract by fraud, she may repudiate it, or have her remedy against the party by whom she was defrauded. But she cannot therefore sue and recover upon a different contract from the one actually made.

"2. The insurance company made the policy upon the application in writing, and made its correctness an express condition of the validity of the contract. A knowledge by their agent that it was not correct is no evidence of any waiver by the company. *Exceptions overruled.*"

FRANCIS A. CALVERT & another vs. HAMILTON MUTUAL INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861.)

Disclosure of New Facts.

If the by-laws of an insurance company are expressly made a part of the policy, and provide that if subsequent to the making of the application any new fact shall exist, by the change of any fact disclosed in the application, or the erection or alteration of any building, which increases the risk, or which it would have been necessary to state had it existed at the time when the application was made, the policy shall be void unless written notice is given to the directors and their written consent obtained; the insured is bound to the same degree of strictness in disclosing the existence of new facts whether material or not, as in disclosing the facts existing at the time of making the application.

CONTRACT upon a policy of insurance. At the trial in the superior court, before Rockwell, J., a verdict was returned for the plaintiffs, and the defendants alleged exceptions. The facts are stated in the opinion.

HOAR, J. In this case it was shown that a building described in the application, on the southeast corner of the main building, as "one story in height and twenty by twelve feet, and used for wool washing," was removed after the policy issued, without any such consent of the defendants as the policy required, and another building was put up in its place, two stories in height, and twenty by thirty feet, and used for drying wool by means of stoves. The defendants contend that this alteration avoided the policy. The question depends upon the construction to be given to the 14th article of the by-laws of the insurance company, which is in these words: "If, subsequent to the making of the application, any new fact shall exist, either by a change of any fact disclosed in the application, the erection or alteration of any building, the carrying on of any hazardous trade, the deposit of any hazardous goods in or near the property insured by the assured or others, which increases the risk, or which it would have been necessary to state had it existed at the time the application

¹ 1 Allen, 308.

Disclosure of New Facts.

was made, the policy thereon shall be void, unless written notice thereof shall be given the directors, their written consent signed by the secretary obtained, and an additional premium and deposit paid."

The provisions and covenants as to the answers in the application to all matters inquired for were substantially the same as in the case of *Tebbetts v. Hamilton Mutual Insurance Co.* 1 Allen, 305;¹ and the rights of the parties respecting them are therefore the same.

The instructions given by the court upon this point were, that "if any additions or alterations have been made by the plaintiffs or others in the property insured, or in the mode of using it, which did not increase or change the risk in any manner, and which would not have been necessary to be stated, in order to a full understanding of the risk at the time of the application, and such alterations or additions in no way affected the risk, such alterations or additions would not avoid the policy."

We are of opinion that these instructions appended to the provision in the by-law a qualification which essentially varied its meaning. The by-law does not use the phrase, "which it would have been necessary to state, had it existed at the time the application was made," with the limitation, "in order to a full understanding of the risk;" but uses it without any limitation whatever. Whether the alteration increases the risk, or whether it comes within the scope of the questions asked by the company, although not, in the judgment of others, material to that risk, it is to be communicated, or the policy becomes void.

The defendants had the right to reserve to themselves the power to decide upon what statement of facts the contract should be made; and to determine for themselves what facts it was important to them to know. This right they had carefully guarded by other provisions in the policy. They required certain facts to be fully and exactly stated, in answer to specific interrogatories, and without regard to the materiality of the facts, as a condition of the validity of the contract. By language clear and unmistakable, and precisely adapted to accomplish their purpose, they extended the same rule to the case of alterations made after the policy had issued. They reserved the right to cancel the policy when it should be considered injurious to the company.

¹ *Ante*, p. 534.

Mortgage.

They chose to retain the power of exercising their own judgment upon the expediency of terminating the risk, upon a view of facts of the same kind as those which they required to be made known to them before the risk was first assumed. The plaintiffs covenanted that this information should be furnished, or that the policy should become void. The alterations were made; a building of different height and dimensions from that stated in the application was erected; if such a building had existed at the date of the application it would have been necessary to disclose it, in order to answer the interrogatories fully or properly; and the information was not given. The law will not allow the opinion of witnesses, or of the jury, to have the effect of dispensing with the performance of the express terms of a lawful contract. The policy has become void.

If the terms on which the defendants are willing to issue policies are such as are inconsistent with the reasonable security of the insured, the remedy must be sought from the legislature, or the public must resort to companies whose rules afford a better chance of protection. Our whole authority and duty is to interpret and enforce the agreements of parties and not to make or change them.

Exceptions sustained.

RODNEY EDMANDS *vs.* MUTUAL SAFETY FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861.)

Mortgage.

A mortgage is a material alteration in the ownership of property insured; and, under a by-law of an insurance company which provides that "all alienations and alterations in the ownership, situation, or state of the property insured by this company, in any material particular, shall make void any policy covering such property, unless consented to or approved by the directors in writing within thirty days," will avoid a policy issued "under the conditions and limitations expressed in the by-laws," unless so consented to or approved.

CHAPMAN, J. This is an action of contract on a policy of insurance, which is declared on its face to be issued "under the conditions and limitations expressed in the by-laws," which are annexed to the policy. Article 11 of the by-laws provides that "all alienations and alterations in the ownership, situation, or state of the property insured by this company, in any material particular, shall make void any policy covering such property, unless consented to or approved by the directors in writing within

¹ 1 Allen, 311.

Mortgage.

thirty days." It appears that subsequently to the making of the policy, the plaintiff made a mortgage of the property to one Wheeler; and the defendants contend that this mortgage avoids the policy.

But a mortgage is held not to be an alienation of the property. *Jackson v. Massachusetts Ins. Co.* 23 Pick. 418; *Rice v. Tower*, 1 Gray, 426. It is however an alteration in the ownership. It alters it from a legal to an equitable ownership. It introduces a new owner to the extent of the sum secured by the mortgage, and to the same extent it takes away the direct interest of the assured.

But to bring it within the by-law it must be a material alteration. It is not material in respect to the lien of the defendants, because a subsequent mortgage must be subject to the lien. But it is not necessary that it should affect the lien in order to make it material. *Davenport v. New England Ins. Co.* 6 Cush. 340; ¹*Packard v. Agawam Ins. Co.* 2 Gray, 334. In the case first cited the court remarked as follows: "But irrespective of the lien, whether the defendants would or would not have one, the misrepresentation was clearly a material misrepresentation. It was material for the insurers to know of the incumbrances, in reference to the responsibility of the insured, and his ability to meet his engagements to the company; it was material to know who was interested in or had any title to the estate; but more particularly and especially was it material for the defendants to know what interest the plaintiff himself had in the premises, and whether his estate was incumbered or unincumbered." These remarks were made in regard to a mortgage existing at the time of issuing the policy, but not stated by the insured in his application. They have the same force in regard to a mortgage made after the issuing of the policy, if the parties made their contract in reference to such a mortgage, as they seem to have done here. They had a right to treat such an alteration of the title as material, if they judged it to be so, and the language of the eleventh by-law shows that they did thus judge. Unless we give this construction to the word "alterations," it has no force. This construction of the by-law is aided to some extent by the fact that the application contains inquiries as to the ownership of the property and incumbrances upon it; and on the back of the

¹ *Ante*, vol. 3, p. 129.

Neglect to pay Assessment.

policy there is a blank form for an assignment of it in case of a mortgage, and also a form for the assent of the directors to such mortgage. And after this mortgage was made, the plaintiff left the policy with the secretary to get the assent of the directors, but failed to obtain it. One reason of the failure was, that the plaintiff had neglected to sign the assignment of the policy. It appears therefore that the parties understood the by-law as the court have construed it. It is a different provision from any that has been contained in any other policy that has come before the court for interpretation. *Exceptions sustained.*

EBEN W. LOTHROP & others vs. GREENFIELD STOCK AND
MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, January Term, 1861.)

Neglect to pay Assessment.

A policy of insurance issued by a mutual insurance company, under the conditions and limitations expressed in the by-laws thereto annexed, one of which provides that the policy shall become void "if the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," is rendered void by the neglect of the assured to pay the amount of an assessment upon his premium note, for thirty days after a written request for payment, prepaid, duly directed and deposited by the company in the post-office, in due course of mail, would reach the place of his residence, as set forth in the policy, whether he received such request or not.

CONTRACT on a policy of insurance upon the dwelling-house of James Simpson, of Roxbury, issued by a mutual insurance company "under the conditions and limitations expressed in the by-laws" annexed to it. The sixteenth by-law provided that the policy should become void for various causes, the last of which was, "If the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise." The policy was made payable in case of loss to the Chelsea Loan Fund Association, of which the plaintiffs were trustees. After the policy was issued, Simpson went to Pittsburg, Pennsylvania, to obtain employment temporarily, as a mechanic, and while there, assessments to the amount of \$7.64 were laid, and the house was destroyed by fire. The defendants introduced evidence to prove that they deposited in the post-office at Greenfield, about four months before the loss, a prepaid notice of the assessments upon the premium note, with a request for the payment of the same, addressed to the assured,

¹ 2 Allen, 82.

Neglect to pay Assessments.

at Roxbury ; and the plaintiffs introduced evidence to show that they never received the notice. Allen, C. J., ruled that the defendants must prove that the assured, or his agent, if he had any, received the notice, or the plaintiffs would be entitled to recover. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

BIGELOW, C. J. The trial of this case seems to have proceeded on the ground that the validity of the policy, on which the plaintiff seeks to recover, depends on the question, whether, according to the true construction of the last clause of the sixteenth article of the by-laws, it appears, by the facts in proof, that the plaintiff has neglected, for the term of thirty days, to pay assessments upon his premium note, when requested to do so by mail. If he has, then it is admitted that, by the express terms of the contract, the policy is void.

The interpretation of this clause is not free from difficulty; but, looking at the manifest purpose for which it was inserted in the contract, and construing it in the light furnished by analogous cases, we are of opinion that the plaintiff has not complied with the stipulation, and is not entitled to recover on the policy. There can be no doubt that the clause was intended for the benefit of the insurers. The company was chartered as a corporation designed to make contracts of insurance mainly on the mutual principle. It necessarily depended, in great measure, on the prompt and punctual payment of assessments on its premium notes, for its resources to pay losses and other claims for which it might be held liable. It was, therefore, important to adopt some mode by which notice of such assessments could readily be given to the holders of policies, and their immediate payment enforced. It would manifestly be attended with great difficulty and embarrassment, if the corporation was compelled to demand payment of the signers of each of their premium notes personally, or, in case of neglect to pay on demand, to resort to legal process to collect such assessments which might be laid in the prosecution of their business. The cost and delay of making collections in the ordinary way of small sums from many persons, scattered over a large extent of territory, would be very burdensome, and render the income of the corporation uncertain and precarious. It was, doubtless, to obviate these difficulties that the clause of the by-law under consideration was inserted. Nor was it an

Neglect to pay Assessment.

unreasonable stipulation. The chief consideration of the contract of insurance was the premium note; and the assured could not reasonably claim the benefit of his policy, unless he was willing to agree to some mode in which the corporation could claim the prompt fulfilment of his part of the contract. By the stipulation to pay on a demand made by mail, the assured agreed to accept the risks which that method of giving notice necessarily involved. The duty of the corporation was performed by placing a notice in the post-office, duly directed to the assured. This was all that could be done by them in fulfilling their part of the stipulation. They could not follow the letter to its destination, nor prove that it was actually received by the assured. A request by mail is a familiar phrase, and has a well understood meaning. It does not import that the person to whom it is addressed shall receive it, but only that the person by whom it is to be made shall deposit in the post-office a written request, duly directed, so that, in the usual course of mail, it will reach its destination. *Shed v. Brett*, 1 Pick. 401. Such was the intention of the parties in the present case. Any other construction of the contract would defeat the very purpose of the stipulation, because it would render it more difficult for the corporation to prove a demand by mail and its receipt by the assured, than it would to show a personal demand on him for the assessment.

In support of this reasonable interpretation of this clause of the policy, we have the analogy of cases in which payment of a debt is established by proof of a remittance of the amount by mail. In all cases where, by the direction or agreement of a creditor, money is sent by mail in discharge of a debt, proof that a letter, containing the requisite sum, duly sealed and directed, was deposited in the post-office, is sufficient to maintain a plea of payment. *Warwicke v. Noakes*, 1 Peake R. 67; *Hawkins v. Rutt*, Ib. 186; *Kington v. Kington*, 11 M. & W. 233. These decisions rest on the principle that the debtor has done all that was in his power to perform the contract, and that the risk of transmission was assumed by the creditor. We are unable to see that the same principle is not applicable to the contract which forms the subject of the present controversy. The defendants, whose duty it was to make the request, transmitted it in the manner stipulated by the contract. They could do nothing further.

Market Value.

They did not agree that the plaintiff should receive their letter. Nor was it the agreement of the parties that the request, to be binding on the plaintiff, should be received by him. The contingency of the failure of the notice to reach him through the mail was not provided for by the contract, and cannot, therefore, be set up as forming a valid ground on which to defeat its express stipulations.

The evidence stated in the bill of exceptions does not show that the assured had changed his domicile, at the time the notice was sent to him by mail at Roxbury. It proves only a temporary absence, of which the defendants had no notice. But if it were otherwise, and it had appeared that the plaintiff had changed his domicile, we do not think the duty of the defendants would have been changed. The stipulation for a notice to the assured by mail must be construed with reference to the other parts of the contract, in which he is described as a resident of Roxbury, and is an agreement to give such notice to him at that place. He could not avoid this part of his contract, and defeat the stipulated effect of the request by mail, by changing his place of residence without notice to them. Until such notice, the defendants performed their part of the contract by sending notices addressed to him at the place in which he was described as residing at the time the policy was issued.

Exceptions sustained.

BONNER vs. HOME INSURANCE Co.¹ (Supreme Court, Wisconsin, January Term, 1861.) *Examination under Oath.*

The policy in suit provided that the insured might be examined on oath as to the loss, that he should answer all questions put to him, and subscribe his statement; and the sum should not be payable until such examination had been made. *Held*, that this provision did not require that the examination should be completed at one time, but that it might be adjourned by the company for a reasonable time, and then be proceeded with. And there being no evidence of any objection by the assured to an adjournment for two or three weeks, it will be presumed that he consented thereto.

EQUITABLE FIRE INSURANCE CO. vs. QUINN.² (Queen's Bench, Quebec, March, 1861.) *Market Value.*

An insurance company is liable to a party whose stock in trade is insured by them, for the actual market value of such stock at the time of the loss by fire; and not for the cost price thereof, or the sum which it may have cost the party insured to manufacture such stock, notwithstanding that the assured had not insured his profits upon the subject insured.

¹ 13 Wisc. 677.

² 11 L. Can. R. 170.

PEORIA MARINE AND FIRE INSURANCE CO., appellant, *vs.*
JAMES C. WHITEHILL, appellee.¹ (Supreme Court, Illinois, April
Term, 1861.) *Partial Loss. — Waiver. — Contiguous Notary. —*
Limitation Clause.

The rule is well settled that under an averment of a total loss on a marine policy the plaintiff may recover for a partial loss. The same rule applied to fire policies.

If an insurance company put their refusal to pay on some other ground than that of a defect in the preliminary proofs, and suggest no defects in such proofs, their silence will be held a waiver of the defects.

The distance of a few feet between two notaries or magistrates required to certify as to the loss will not be regarded.

The common limitation clause is valid; but its requirements may be waived by the conduct of the company, as where by fraud or by holding out reasonable hopes of an adjustment, they deter the assured from commencing suit. See *Gooden v. Amoskeag Fire Ins. Co.*, ante, vol. 3, p. 1.

GREAT WESTERN INSURANCE CO., plaintiff in error, *vs.* NICHOLAS STAADEN, defendant in error.² (Supreme Court, Illinois, April Term, 1861.) *Preliminary Proofs. — Certificate of Notary. — Seq.*

Preliminary proofs having been received by the defendants below and retained for six weeks without objection, held, a waiver of a defect in the certificate of loss. But where the suit is brought by N. S. and the notary's certificate as described in the declaration is to C. S., the plaintiff cannot recover without an averment in the declaration that N. S. and C. S. are the same person.

Seem, that the want of a seal to the notary's certificate would be cured by verdict.

SKIPPER *vs.* GRANT, Chairman of Liverpool and London Fire and Life Insurance Co.³ (Common Bench, England, May, 1861.) *Arbitration. — Salvage.*

The plaintiff had effected three policies on goods, — one for £3,000 with the A. Company, another for £2,500 with the B. Company, and a third for £2,500 with the C. Company. A fire having happened, the plaintiff's claims against these three companies were referred to arbitration. The agreement of reference recited that the plaintiff had claimed to have made good by the several companies parties thereto, or some of them, the loss thereby sustained to the chattels and things insured, so far as the said loss was covered by the policies or any of them, and that four schedules, severally marked A, B, C, and C a, contained the particulars of all the chattels and things alleged by the plaintiff to have been covered by the said policies or some one of them, and to have been destroyed or injured by the fire. It further recited that "it had been agreed between the said parties thereto that the claim of the plaintiff, so far as respected the chattels and things particularized in Schedule A, should be satisfied by means of the payment to him of a sum of £2,771 19s. 5d., such sum being the agreed value at the time of the occurrence of the fire of the last mentioned chattels and things, as the plaintiff did thereby admit." It further recited that difficulties had arisen respecting the settlement of the said claim of the plaintiff so far as the same had not been agreed to be satisfied as aforesaid, and respecting the adjustment of the respective liabilities of the said companies as between or among themselves to the total loss covered by the said policies. It then proceeded to refer it to the

¹ 25 Ill. 466.

² 26 Ill. 360.

³ 10 C. B. N. S. 237.

Forfeiture. — Waiver. — Proofs of Loss.

arbitrators "to award and determine what was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said policies, or any of them, in respect of loss or damage occasioned by the said fire to or in the said chattels or things particularized as aforesaid in schedules B, C, and C a, and what were the several proportions in which such total sum, and also the said sum of £2,771 19s. 5d., agreed to be paid as aforesaid, ought to be borne and paid among or between the several companies."

The arbitrators by their award found that £3,288 0s. 7d. was the total sum of money which ought to be paid to the plaintiff under or by virtue of the said three policies, in respect of loss or damage occasioned by the fire to the chattels and things particularized in schedules B, C, and C a; and they directed that this sum of £3,288 0s. 7d., and the £2,771 19s. 5d., so agreed to be paid to the plaintiff in satisfaction of his claim in respect of the loss or damage occasioned by the fire to the chattels and things particularized in schedule A., — making together £11,000, should be borne and paid by the three companies in certain proportions. They then found that the loss or damage sustained exceeded the sums insured, and that the whole salvage and proceeds of the salvage of and from the said fire belonged absolutely to the plaintiff. *Held*, that, in awarding that the plaintiff was entitled to the salvage, — which it appeared from the record arose solely from the goods particularized in schedule A, — the arbitrators had exceeded their jurisdiction.

KEENAN vs. MISSOURI STATE MUTUAL INSURANCE CO.¹

(Supreme Court, Iowa, June Term, 1861.)

Forfeiture. — Waiver. — Proofs of Loss.

If, with full knowledge of a forfeiture, an insurance company collect assessments on the premium note of the assured, they thereby waive the forfeiture.

Objections to the preliminary proofs are not waived by mere silence on the part of the company.

PROCESS of garnishment. The defendants set up various defences to their liability to the debtor, alleged to arise upon the policies in question.

WRIGHT, J. The following instructions were asked and given: "In mutual insurance companies all the insured are members, and all the members are insured. If the policy becomes void, the person insured is no longer bound on his premium notes, for any losses sustained after the vacation of the policy, but would be bound to pay all losses sustained prior to the invalidation of the policy." And again: "If assessments for losses were made on the premium notes of the Odd Fellows' Hall Association, and such losses occurred after the building insured in this policy was appropriated for a purpose and occupancy which forfeited the policy; if you find from the evidence that there was any such appropriation and forfeiture, and such assessments were made and collected by the company with a full knowledge of the for-

¹ 12 Iowa, 126. We have omitted from this case the rulings concerning the powers of the company's agent. They involve nothing but general principles pertaining to agency.

feiture, such a state of facts, if proved, would justify you in finding that such forfeiture had been waived."

The question of practical importance arises on the last instruction. For if there was no forfeiture, then the liability upon the premium note, of course, continued. If there was a forfeiture and no waiver, then the general principle, which governs the liability of the assured after the policy becomes void, is not material to our present inquiry. The two instructions, however, were given in the same connection, and will be thus considered.

Considered as an equitable question it would seem that if there was a forfeiture to the extent of releasing the insurers from liability on the policy, the insured should no longer be held on their premium notes. The burdens and benefits should go together. True, the rule is, that one party cannot by his own act, in violating his contract, release himself from liability. If, however, the parties have by the terms of their agreement fixed the consequences of a forfeiture on a violation of it, this becomes to them the law of their contract, and by it they are to be governed. Thus, if it is stipulated that the doing of an act shall result in putting an end to the contract, aside from the question of damages for the breach, as it would cease to have effect for the benefit of one, so it would for the other. The person claiming the forfeiture, and insisting upon his non-liability as a consequence thereof, should not be allowed to claim benefits under it as a continuing and subsisting contract.

The consequences provided for the appropriation of the premises to uses hazardous or extra hazardous, during the continuance of the policy, as fixed by the conditions annexed, are that the policy shall cease to be of effect "so long as the same shall be so used." The language used is not that "this policy shall *thenceforth* be void and of no effect," as in *Smith v. Saratoga Ins. Co.* 3 Hill, 508,¹ but only so long as the building is so used. When the hazardous trade or occupation ceased, therefore, the policy had its original force, and this without any act on the part of the company. If the effect of the condition or forfeiture had been to render the policy absolutely void and of no effect, then according to the case in 3 Hill, *supra*, this would have made it a dead body, to which nothing short of a new creation could have imparted vitality. And yet that case even is not sustained by the authorities.

¹ *Ante*, vol. 2, p. 94.

It being then possible to revive the policy, notwithstanding such use, without any act of the company, why may not this use be recognized and the forfeiture therefrom be waived by the company? And if an act has been done by the company with full knowledge of the forfeiture, which is utterly inconsistent with the hypothesis that they relied upon the breach alleged, and which act would naturally and justly influence the conduct of the other party, would it not be unconscionable and grossly inequitable to permit them now to insist upon a different position? Having voluntarily assumed their ground, there is no reason why they should not be held to it. Thus, if with full knowledge of the forfeiture they nevertheless collected assessments for losses occurring after, they ought not, "in good conscience and honest dealing," [to] be permitted to gainsay the admission implied from the act. At least, would a jury be justified in concluding from such assessment and collection that the forfeiture had been waived?

The case of *Frost v. Saratoga Ins. Co.* 5 Denio, 154,¹ is in point, and fully sustains these instructions. That of *Smith v. Same*, 3 Hill, 508,² really recognizes no different rule. And see 12 Verm.

As already stated, another part of the defence related to the failure of the association to render a particular account of the loss as required by the "conditions of insurance" annexed to the policy. It is not claimed that this condition was strictly complied with, but that something was done, and that a full compliance was waived by the insurance company. And upon this subject the court instructed: 1st. "While it is one of the conditions of the policy, that in case of loss or damage by fire the assured shall, as soon thereafter as possible, deliver a particular account and notice of the loss, verified by the oath or affirmation, this must be done before the insurance company is liable; but a mere failure to verify such account or notice, when the same is received in silence by the company, without objection or notice of the want of the affidavit on the part of the company, and when no request is made for further particulars, the jury would be justified in finding that the company had waived such requirement." 2d. (After reciting the conditions of the policy as to notice and proof of loss as before) it is said: "This must be complied with before the insurance company is liable on the policy, and mere silence on the part of the company is not a waiver

¹ *Ante*, vol. 2, p. 617.

Ib. p. 94.

Forfeiture. — Waiver. — Proofs of Loss.

of such proof of loss." 3d. The following instruction was refused: "Mere failure on the part of the company to notify the insured that the *notice of preliminary* proof was insufficient, would not amount to a waiver."

It is not denied that the making of this preliminary proof was necessary to entitle plaintiffs to recover. Ordinarily the compliance with such condition is a condition precedent, and its performance must be alleged and proved. 2 Greenl. § 406. This, like any other condition, may be waived, however, and the company be liable. *Columbia Insurance Co. v. Lawrence*, 2 Pet. 53.¹ What amounts to a waiver, or whether there has been a waiver in the particular case, is the question of difficulty, and that which has given rise to much discussion in elementary works, and in the reported cases. Without entering into this discussion, we unite in the opinion, that the second instruction above quoted was correct, and that the first was erroneous. Mere silence, we do not think, can be construed into a waiver of the proof required. Silence, with something more, may be sufficient; that is, the jury might be justified from silence, and something else, in inferring a waiver, but not from silence alone. And by something else, we mean more than the doing, or not doing, of those things, which after all amount to mere silence. To instruct that mere silence is not sufficient, and at the same time hold that the failure to do something, which failure is nothing more than silence, will be sufficient, would at least tend to mislead and confuse the jury. If A makes no objection to the sufficiency of a written instrument handed him, and makes no request for further particulars, he is after all, practically and in legal contemplation, only silent, and if silence would not estop him, neither would the omission to object and demand further particulars. Of course, if the law made it incumbent on him to object or demand more, and for his failure to do so made him liable, the case would be different. Or, if it appeared that with his silence he so acted as to induce the opposite party to believe that he accepted the instrument, and thus led him to conclude that there was a waiver, though none was intended, he might be bound. Where, however, the contract of the parties and the law require that a condition precedent shall be performed, if it is attempted, but not performed, the failure of the party to request more, or to object to the sufficiency, is but silence, and mere silence is not a waiver.

¹ *Ante*, vol. 1, p. 264.

We have said that silence and something more might be sufficient. Thus, if after the notice was given, being defective, the company, by its agents or proper officers, proceeded to take charge of the premises with the view of self-protection, or if the refusal to pay was put upon other grounds, at the time of giving the notice, than defects therein—these and many other acts might justify the jury in concluding that there was a waiver. In the case from 2 Peters, *supra*, however, the company, after notice, proceeded to examine the title to the premises to ascertain if the assured had an insurable interest, and it was held that this did not amount to a waiver. That case, however, turned upon circumstances peculiar to it, and really has not much application to the point now under discussion. The same case was again before the supreme court (10 Pet. 507), but as to this question, it was disposed of on another ground.

In *Schenck v. Insurance Company*, 4 Zab. 447,¹ the notice was insufficient, and the company examined the claim and refused to pay *exclusively on another ground*. This was held to amount to a waiver. The syllabus in *Heath & another v. Franklin Insurance Company*, 1 Cush. 257, sustains the instruction now under consideration, the language of the two being substantially the same. A reference to the opinion, however, shows that the company, while they made no objection to the notice, put their denial upon other grounds, and this was held a waiver. And in *Ætna Insurance Company v. Tyler*, 16 Wend. 401² (referred to by Dewey, J., in 1 Cush., *supra*), the same rule is recognized. *Clark v. New England Company*, 6 Cush. 342,³ and *Underhill v. Agawam Company*, Ib. 440, were decided upon the same ground, the insurers having declined, after defective notice, to pay the loss for other reasons. *McMasters & another v. The Mutual Company*, 25 Wend. 379,⁴ is to the same effect.

Thus it will be found that something more than mere silence is necessary to amount to a waiver. We have found no case that goes so far as the instruction in this case, and do not think it can be sustained either upon principle or authority.

The instruction numbered above as third, and refused, was properly so, upon the ground that it refers to "the notice of preliminary proof," something which could not properly, and did not, figure in the case. There may be some mistake in the

¹ *Ante*, vol. 3, p. 712.² *Ante*, vol. 2, p. 634.³ *Ante*, vol. 1, p. 576.⁴ *Ante*, vol. 3, p. 131.⁵ *Ante*, vol. 2, p. 54.

record, but there is nothing as far as we can see in the policy or conditions annexed, which made it the duty of the assured to give "notice of preliminary proof;" nor does it appear that any such "notice" was attempted to be given. There could, therefore, be no objection to that which was not given, and as a consequence no waiver from a failure to thus object.

Quere as to the correctness of the above doctrine concerning waiver of defects in the proofs of loss. The ground of the doctrine of waiver, we apprehend, is, that by the failure of the company to object when the proofs are furnished, the insured is lulled into security, upon the very natural and reasonable supposition

that they are sufficient. The company know at once whether they are sufficient or not; and to allow them to remain silent until the trial, and then surprise the assured with a defence which he might have removed had they acted honestly by him, is a clear fraud upon him.

MUTUAL FIRE INSURANCE CO. vs. WILLIAM GROVE DEALE.¹
(Court of Appeals, Maryland, June Term, 1861.) *Insurable Interest. — Husband and Wife. — Misrepresentation. — Practice.*

A deed of real estate to a married woman, under the Act of 1842, ch. 293, sec. 1, vests her with the legal estate in fee, but not to her sole and separate use: in such property the husband still retains his marital rights, and such interest of the husband is an insurable interest.

In an ordinary contract of insurance, the interest of a husband in property conveyed to his wife would be covered by an insurance of the property as *his*, and his omission to state the nature and extent of his interest, where no inquiry is made on the subject, will not avoid the policy.

But in the case of a mutual insurance company, whose charter, to which the insured was bound by the contract of insurance, makes all premium notes liens on the real estate of the assured, to meet losses, the title of the assured is a most important consideration of the contract, and a material misrepresentation or concealment, in regard to it, will render the contract void.

A mutual insurance company, whose charter gave it "full power and authority to make insurance on any kind of property," may insure the interest which a husband has in property conveyed to his wife.

Where a party, in his application for insurance in a mutual insurance company, called the property "his property," and the policy refers to such application, this does not constitute a warranty on his part, that he held the fee simple thereto, unincumbered, a breach of which, by the existence of the legal title in his wife, would render the policy void.

Whether a misrepresentation or concealment by the assured, in a mutual insurance policy, of the true nature and extent of his interest in the property insured, will avoid the policy, depends upon its materiality to the risk, and the question of materiality is a question of fact to be submitted to the jury.

In the case of a mutual insurance company, where there is a lien created on the property insured, a representation or concealment, as to title, may be material to the risk, which would not be so in an ordinary case, but its materiality is a question for the jury, and the court cannot assume it as a matter of law.

The defendant (the company) has a right to ask for a specific instruction, directing the attention of the jury to the particular fact in which the alleged misrepresentation or concealment existed.

Hazardous Goods.

An insurance company is not chargeable with notice at the time of insurance, of the state of the title to the premises insured, as disclosed by the land records, so as to prevent its relying, in order to defeat the action on the policy, on any objection to the title of the assured, which might have been ascertained by an inspection of such records.

Assumpsit is the proper remedy upon a contract, not under seal, for additional insurance indorsed on a policy: there being nothing in the original covenant containing it in force as a specialty, and binding the company, by subsequent indorsements of additional insurance.

WARNER vs. PEORIA MARINE AND FIRE INSURANCE CO.¹
(Supreme Court, Wisconsin, June Term, 1861.) *Other Insurance.*
— *Change of Policy by Agent.* — *Preliminary Proofs.*

The policy in question required that notice of other insurance should be indorsed upon the policy or otherwise acknowledged by the company in writing. After an agent of the company, having authority to receive applications, issue policies, and receive premiums, upon being applied to for insurance in another company which the same agent represented, wrote in the policy in suit, "Other insurance permitted without notice till required:" *Held*, that he would be considered as authorized so to do. Such an agent may also, after the delivery of the policy and before the payment of the premium, correct a misdescription of the name of a street in the policy.

The production of suitable proofs *held* waived by a failure to object to them when given.

HERVEY et al., assignees, vs. MUTUAL FIRE INSURANCE CO.²
(Common Pleas, Upper Canada, Trinity Term, 1861.) *Change of Occupation.*

The premises covered by a policy of insurance were, when insured, used as a store, and were after insurance used as a printing-office, without notice to the company or the settlement and payment of any additional premium for the increased risk, contrary to a condition indorsed thereon: *Held*, that the policy was vitiated.

PHENIX INSURANCE CO. vs. BOLTON L. TAYLOR.³ (Supreme Court, Minnesota, July, 1861.) *Hazardous Goods.*

The written portion of a policy of insurance described the property insured as follows: "On a stock of goods, consisting of a general assortment of dry goods, groceries, crockery, boots and shoes, and such goods as are generally kept in a general retail store." The policy also contained printed conditions of insurance, and it was thereby stipulated that if the premises should be used for the purpose of storing therein any of the goods, &c., denominated hazardous, extra hazardous, or included in the memorandum of special hazards, except in the policy specially provided for, or afterwards agreed to by the company in writing, the policy should be void. The policy also gave printed classes of hazards, arranged under the heads of "Not hazardous," "Hazardous," "Extra hazardous" and "Memorandums of special hazards," among which latter was the following: "Gunpowder, phosphorus, and saltpetre are expressly prohibited from being deposited, stored, or kept in any building insured, or containing any goods, &c., insured by this policy, unless by special consent in writing on the policy." In an action upon the policy it was proved that at the time of effecting the insurance, the insured had among his goods, and kept in his store for sale, a small amount of gunpowder, about twenty pounds, and that gunpowder is an article that is ordinarily and usually kept in a general retail store, in quantities varying from ten to fifty pounds. *Held*, That keeping an article in a

¹ 14 Wisc. 318.

² 11 Upper Can. C. P. 394.

³ 5 Minn. 492.

Estoppel. — Incumbrances.

store, for retail purposes is not *storing* such article within the meaning of the words of the policy. That the written portion of the policy should control the printed stipulations and conditions when there is any want of harmony between them. That the written words in this policy are broad enough to include any articles that are usually dealt in by persons keeping a general retail store, and all such articles are included in the policy, as if each was enumerated at length.

The ninth condition of a policy of insurance provided that the insured, on sustaining loss by fire, was to give notice to the company, or its agents, make oath concerning the value of the property insured, the interest of the insured, and other particulars usually stipulated for in such policies. A certificate was to be furnished signed by a magistrate, commissioner of deeds, or notary public, of the good faith, &c., of the insured. A loss occurring, the local agent of the company was notified, verbally, immediately after the fire, and he suggested delay until the arrival of the adjusting agent. Shortly after, this agent arrived, and made an examination of the books and accounts of the insured, expressed himself satisfied, and took the affidavits of the parties. He told them that no more was required of them, but that he would present the claim to the company. The company afterwards addressed a letter to the local agent, in which they place their refusal to pay the claim upon the sole ground that gunpowder was kept in the building, and make no objection to the sufficiency of the preliminary proofs. *Held*, that by these acts the company waived the ninth condition of the policy.

ASA F. KIMBALL *et al.*, plaintiffs and respondents, *vs.* HAMILTON FIRE INSURANCE Co.¹ (Superior Court, New York City, July, 1861.) *Preliminary Proofs.*

While the silence of the insurer in respect of any defect in the preliminary proofs is a waiver of such defects, it is not necessary to specify the same in particular. It is enough that the insured is apprised that the proofs are worthless and that the company should resist payment.

If new and sufficient proofs be afterwards furnished, the insured cannot sue within the time limited, reckoning from the production of the defective proofs, but must reckon from the time when the correct ones were furnished.

VIRGIL DRAPER *et al.* *vs.* CHARTER OAK FIRE INSURANCE Co.²
(Supreme Court, Massachusetts, October Term, 1861.) *Estoppel.*
— *Incumbrances.*

One who accepts a policy of insurance in which it is expressly provided that it is agreed and declared that the policy is made and accepted upon and in reference to the application filed in the office, is thereby concluded from denying that the application is his, and cannot set up that it was made by an agent employed by him to procure insurance upon his property, but without authority to bind him by representations in the application.

A denial in the application that incumbrances exist upon property to be insured, in reply to a direct inquiry upon that subject, when in fact mortgages thereon do exist, and are known to exist by the applicant, will avoid a policy issued on such application, by a stock insurance company, for a premium fully prepaid, if the policy states upon its face that it is agreed and declared that it is made and accepted upon and in reference to the application, and to terms and conditions of insurance annexed, one of which provides that such application shall be taken and deemed to be a part of the policy, and a warranty on the part of the assured; although the application contains also a provision, at the end of it, that the applicant covenants that "the foregoing is a full, just, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk."

¹ 8 Bosw. 495.² 2 Allen, 569.

EZRA WHITMARSH vs. CHARTER OAK FIRE INSURANCE CO.¹
 (Supreme Court, Massachusetts, October Term, 1861.) *Hazardous Articles.*

A policy of insurance upon a building occupied as a provision and grocery store, which contains a stipulation that, in case the premises shall be used for the purpose of keeping therein any of the articles denominated hazardous or extra hazardous, in the terms and conditions annexed to the policy, the policy shall cease and be of no force or effect, is rendered void by keeping therein oil, sulphur, and matches, if those articles are enumerated in a table of hazards annexed to the policy as hazardous and extra hazardous.

JOHN W. ABBOTT vs. SHAWMUT MUTUAL FIRE INSURANCE CO.²
 (Supreme Court, Massachusetts, November Term, 1861.) *Misrepresentation.*

If a policy of insurance issued by a mutual insurance company contains a provision that it is "upon the express condition that the application upon which this policy is founded shall be held to be a warranty on the part of the insured, and as absolutely a part of this policy and of the contract of this insurance as if it was actually written in and incorporated herewith in full," and the application contains a clause inserted after the printed question by which the applicant covenants "that the foregoing is a full and correct description and statement of all the facts inquired for or material, in reference to this insurance," "that the above statements are substantially true," and "that the misrepresentation or suppression of any facts inquired for or material shall destroy his claim for a damage or loss," the applicant must be held to warrant that all facts inquired for are correctly given, whether material or not; and a policy issued to the "Abbott Worsted Co.," upon an application signed "Abbott Worsted Co., J. W. A., Treas.," will be rendered invalid, if in reply to a question in the application, "Whose is the property insured?" the answer is, "Applicant's," when in fact it belonged solely to J. W. A.: and parol proof is inadmissible to show that the true state of the title was known to the agent through whom the insurance was effected, if the policy contains a provision that every such agent is the agent of the applicant, and not of the company.

Such policy will also be rendered invalid, if in reply to a question in the application calling for the amount of incumbrance upon the property and a full and accurate statement of the true title and interest, the answer is that the property is mortgaged for \$6,600, when it is in fact mortgaged for \$6,684; and if in reply to the question, "How are the several stores occupied? state fully, giving the tenants," the answer is, "See plan," and the plan referred to does not disclose the names of all the tenants.

CARTER vs. HUMBOLDT FIRE INSURANCE CO.³ (Supreme Court, Iowa, December Term, 1861.) *Insurable Interest. — Assignment. — Limitation Clause.*

A legal or equitable title to the property insured is not necessary to constitute an insurable interest. Any interest is insurable when the injury thereto which is insured against would bring upon the insured, by its immediate and direct effect, a pecuniary loss.

A mechanic's lien constitutes an insurable interest.

A policy of insurance may be assigned after the occurrence of the loss insured against, without the consent of the insurer.

A party to a policy of insurance may agree that an action on the policy shall be barred, if not commenced within a specified time.

But under the Code of 1851, such an agreement should be pleaded by answer, and could not be presented by demurrer.

¹ 2 Allen, 581.

² 3 Allen, 213.

³ 12 Iowa, 287.

Mechanics' Lien. — Assignment. — Warranty. — Affirmative and Promissory, etc.

STOUT vs. CITY FIRE INSURANCE CO.¹

(Supreme Court, Iowa, December Term, 1861.)

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A mechanic's lien is insurable.

A policy on a mechanic's lien may be assigned without making an actual assignment of the original indebtedness which was the basis of the lien; nothing to the contrary appearing in the policy.

The policy recited that the building was "occupied for stores below, the upper portion to remain unoccupied during the continuance of the policy." *Held*, that the former part of the statement was an affirmative and the latter part a promissory warranty.

The limitation clause *held* valid.

Where the value of the interest cannot be made within the time stipulated by reason of the nature of the subject matter of insurance, the requirement of such a statement is inoperative.

THE case is stated in the opinion.

BALDWIN, J. This action was brought by the plaintiff, as the assignee of a policy of insurance issued to William Longhurst. The interest of the insured is indicated in the following language: "In consideration of one hundred dollars to them (meaning the defendants) paid by the assured hereafter named, the receipt whereof is hereby acknowledged, do insure William Longhurst (mortgagee), Dubuque, Iowa, against loss," &c., "to the amount of five thousand dollars in Lawrence Block, in the city of Dubuque;" which policy was assigned to plaintiff, the consent of the company being signified in writing, on the back of the policy. The policy bears date October 18, 1857, to continue one year, against loss by fire.

The petition avers, that the interest of said Longhurst in said Lawrence Block was a mechanic's lien, and that the term "mortgagee" was intended to include and describe a mechanic's lien, and that said Longhurst so made his interest known to the defendant at the time he made application for the insurance, and when the insurance was effected; and that it was by mistake of the agent of the company that the word "mortgagee" was inserted in said policy; and that said agent at the time the policy was executed assured Longhurst, that such description was sufficient to indicate the nature of the interest held by him, and which he desired to have insured. Upon this averment of intention and mistake, issue was joined, and the parties stipulated in

¹ 12 Iowa, 371.

writing that any evidence to correct any mistake in the terms of the policy sued on might be introduced in this proceeding which might be given in a proper chancery proceeding for the same purpose, and that relief should be granted accordingly under the issue thus made.

Here there was an issue or matter of fact, upon which the jury, under the instructions of the court, could properly find. Under this issue the plaintiff proposed to introduce the policy above referred to as evidence; to which the defendant objected, for the reason that its terms showed that the interest of a "mortgagee" was insured, which objection was overruled by the court. Numerous other objections having the same object in view, and tending to the same end, were disposed of in the same manner. We do not deem it necessary to examine minutely the several objections as made by the defendant. We can see no good reason why the policy should not have been introduced, with any other testimony which tended to prove the mistake or intention of the parties, under the issue and stipulations filed.

It is claimed by the defendant that if the mistake which is sought to be reformed and corrected is one of law, the same cannot be reformed. And also, that if there was a mistake between the parties, it was one of law purely, and that the parties thereto must abide the consequences. This no doubt is the common law doctrine, and if the Code (§ 2401) did not control this doctrine to some extent, we should perhaps, examine the question more minutely. We think, however, that the issue in this case made a question of fact, upon which the jury could legitimately find, and as both the insured and the agent who issued the policy testified that the applicant desired to be insured against loss by fire, upon an interest which he held as a mechanic's lien, and that he was persuaded by the company, at the time the term "mortgagee" was inserted in the policy, that it covered that interest, and he was thereby induced to accept the policy; and as both the evidence and the instruction clearly indicate that the jury did find upon this issue, we are not disposed to disturb that finding. There is no conflict of evidence upon this point, and the matter was properly submitted to the jury, under this issue.

There are three other assignments, upon which counsel for appellant claim a reversal, which we think proper to consider, the contract being treated as reformed, and a mechanic's lien being insured.

I. It is claimed that Longhurst had no insurable interest in the building, and that if he had, the said assignment was void, the original indebtedness of David, the owner of the building insured, not having been assigned.

First. Had Longhurst an insurable interest in the property insured? The testimony shows that Longhurst had done work under a contract with the owner of the building insured; that the building was consumed by fire, on the 21st day of January, 1858; and that at the first term of the court next thereafter, he prosecuted his suit against the said owner, for the sum of \$18,000, and that he finally obtained judgment for the sum of \$17,125, and established his mechanic's lien upon the lots upon which the insured building was located. The judgment thus rendered is the highest grade of evidence, and conclusive until reversed. We can come to no other conclusion, taking all of this testimony, than that Longhurst had a legitimate interest in said building. Then if legitimate, is it not a subject in relation to which parties may contract? And if so, why may not the insurance company contract to insure that interest? The policy itself shows that it is the ostensible business of the company to take such risks, and if the subject matter of the contract is legitimate, why is not the interest insurable?

Second. Can this policy be assigned without making an actual assignment of the original indebtedness which was the basis of the lien? The policy contains the following language: "And said company (meaning defendant) promise to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss," &c. And in the fourth clause of the annexed conditions, we find the following: "Policies of insurance subscribed by this company shall not be assignable without the consent of the company indorsed thereon. In case of assignment without such consent, whether of the whole policy, or any interest therein, the liability of the company in virtue of such policy shall therefrom cease." We think this language clearly indicates that the parties themselves have controlled this matter of assignment, and a necessary construction shows that the policy may be assigned, if the company first give their consent in writing. The testimony clearly shows that the plaintiff, as assignee, held the policy by virtue of said assignment, and as collateral security for an indebtedness of Longhurst to plaintiff. The indemnity is not

so separated from the original indebtedness of Longhurst, as to render it void. The assignment passes with it all the necessary functions to carry the object of it into effect. The intention of the assignment was to place the assignee in the shoes of the assignor, so far as to recover the money in case of a destruction by fire of the property insured — a mere direction that the money should be paid to plaintiff. We can but determine that the plaintiff had an insurable interest in the property insured, and that the assignment was legitimate, and being with the consent of the company, and for a proper purpose, it did not render the policy void.

II. It was claimed that there was a warranty by the party insured, that the occupation of the property insured, or the business carried on in the same, should be continued as it was when the insurance was effected, during the continuance of the policy; and that the business not being so continued, there was a breach of the warranty, and that plaintiff should not recover. Was there such a warranty as is claimed? The language of the policy, which the defendant claims, in law, amounts to a continuous warranty, is as follows: "In consideration of one hundred dollars to them (the company) in hand paid by the assured, the receipt whereof is hereby acknowledged, do insure Wm. Longhurst (mortgagee) against loss or damage by fire, to the amount of five thousand dollars, on the five story brick building, and the three story addition, known as the Lawrence Block, occupied for stores below, the upper portion to remain unoccupied, during the continuance of this policy." The testimony is that a portion of the lower story of the building was occupied for a dancing academy, in the month of December, 1857. Defendant claims that the language in the policy, "occupied for stores below," is in law a warranty that the same should continue to be thus occupied, during the continuance of the policy, and that any change in the use of the rooms below was a breach of such warranty, and avoided the liability of the company.

We will inquire first, what is a warranty in a policy of insurance against loss or damage by fire? And the facts of this case will necessarily lead us to inquire as to the different kinds of warranties, whether express, promissory, or executory. There may be several warranties, and of each class, in one policy. "The stipulations in policies are considered express warranties. An

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express warranty is an agreement expressed in the policy whereby the assured stipulates that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done. It is not requisite that the circumstances or act warranted should be material to the risk." 6 Wend. 488, and cases cited. There may be affirmative and promissory or executory warranties. See Angell on Fire Ins. § 145, and cases cited.

The policy in this case contains both affirmative and executory warranties. 1st. The acceptance of the policy with the clause that the lower story of the building insured was, at the time the policy was effected, occupied for stores, was an affirmative or express warranty that the same was at the time so occupied. And if the representation was false, in other words, if the lower story was not then so occupied, whether material to the risk or not, would avoid the policy. 2d. The upper portion of this building insured, as set forth in the policy, was to remain unoccupied during the continuance of the policy. This portion is promissory or executory, and must be strictly complied with on the part of the assured, or the policy will be avoided, whether material to the risk or not. The distinction between the affirmative or express, and promissory or executory warranties is very perceptible in this case. The former represents that a certain fact did exist at the time the policy was effected; and the latter, that a certain thing should exist during the continuance of the policy; both made equally material by the parties themselves, and each fatal to the assured if false or not executed. Even if it be admitted in this case as claimed by defendant, the evidence fails to show that the plaintiff had control of the building insured; he did not stipulate that the lower story of the building should continue to be occupied for any particular purpose during the continuance of the policy. There is nothing of that kind on the face of the policy, nor is there anything in the by-laws or conditions annexed to the policy preventing a change of business, if said change does not add materially to the risk taken. The policy may be wholly avoided by the using of the building insured for the purposes that are specially prohibited in the by-laws or conditions annexed to the policy, classified as hazardous or extra hazardous. Or it may be made void by materially increasing the risk in any other manner. The representation in the policy — "the lower story occu-

pied as stores" — indicates that the same was so occupied at the time the insurance was effected, and is not a continuous warranty. See *O'Neil v. The Buffalo Ins. Co.* 3 Com. 122. If not continuous, no breach of the warranty can be claimed.

III. It is claimed that the plaintiff ought not to have recovered in the court below, for the reason that he was concluded, he not having brought his suit within twelve months after the loss, as provided in a by-law or condition attached to the policy. The provision thus referred to reads as follows: "It is furthermore hereby expressly provided that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or change shall occur; and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby attempted to be enforced."

We are brought directly to the inquiry, whether this provision attached to the policy is binding in ordinary cases, and if so, are there any circumstances that make it inoperative in this case?

The third instruction asked by plaintiff and given by the court is placed upon the hypothesis, that such a stipulation or condition is in all cases invalid and void, and that it is no bar to an action, although it may have been commenced after the twelve months expired; that it contravenes the statute of Iowa, and although inserted in the policy or in the conditions annexed thereto, and made a part of the contract, it is of no force whatever. It is admitted by counsel in their argument that the authorities are somewhat in conflict upon this subject. After an examination of those cited in the briefs, so far as we have been able to refer to them, we come to the conclusion that where there are no qualifying circumstances controlling the same, the weight of authority supports the validity of this provision. In other words, that such regulation may be made by the company, and when accepted by the assured, in ordinary cases, it becomes valid and binding. We are unable to see why the contract to take risks may not be treated as any other contract or stipulations mutually binding upon the parties thereto, unless it is tinged with

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fraud, is against the policy of the country, or in some manner contravenes the law. Why may not parties to a contract fix their own terms, as well as the time of bringing suit, or any other ingredient entering therein? It is a matter of mutual agreement between the parties themselves. They may have the benefit of the statute of limitation, unless they waive it and fix their own limitation. This clause in the contract in ordinary cases may be the inducement, for one party or the other, to enter into it, and as a matter of right, it should be regarded as valid. We, therefore, do find that the court below ruled erroneously upon this question, both in giving the instructions of plaintiff, and in refusing those asked by defendant.

But while it is true, that this provision should in ordinary cases be held as valid, yet a contract of insurance is treated like any other contract; and the same rules of construction must govern it. To construe this policy, we must take our stand-point where the parties themselves stood, consider each and all of its parts, and if there are conflicts in the different provisions of the policy, then the facts and circumstances surrounding the transaction must determine how the parties themselves understood it, and that construction must prevail. The point once settled, that the interest insured was a mechanic's lien, and the conditions of the policy such, that the assured or his assignee is required, before the commencement of his suit on the policy, to prove to the company the value of the interest that he may have in the building insured, and if this cannot be done in the ordinary proceedings in courts, necessary to be pursued, or if such proof cannot be made in a legitimate way within one year after loss, then this condition requiring suit to be commenced within one year is rendered inoperative by the parties themselves. The best evidence, indeed, as we regard it, the only legitimate evidence, to prove the value of the interest (which proof of value is required, by the conditions of the policy, to be made to the company before the commencement of the suit), is the established lien of the mechanic, as adjudicated by the court against the owner of the building. In this case, one David was the owner of the building insured, and Longhurst the mechanic and contractor. While he had a lien for his work, and the material furnished, the court had to determine the value of such work and material. The mechanic had no more right to place a value upon the same, than he for whom the

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work was done. The lien must be established by the judgment of the court. And the amount of such lien was the interest insured. The judgment, as before stated, is the best and only evidence to prove that value.

The insured in this case having pursued his remedy to obtain said judgment with diligence, and having made his proof of the loss, and the value of the interest in the manner necessary to be pursued to establish such proof, and having then pursued his remedy against the company with all ordinary diligence, the condition requiring that suit should be brought on the policy within one year is rendered inoperative. Any other conclusion would do violence to the construction given to the instrument by the parties themselves, as disclosed by the contents of the contract, taking into consideration the character and nature of the interest insured, and the conflicting requirements in relation to the same.

Although the court below erred in giving the instruction asked by plaintiff upon the question of limitation, in the manner that it did and without qualification, yet as this error did not prejudice the rights of the defendant under the view we take of the case, the judgment will not for this error be reversed.

There are other questions presented by counsel for appellant which we have examined, but cannot conclude that the ruling of the court below was erroneous. *Judgment affirmed.*

WRIGHT, J., dissenting. I think plaintiff's action was barred by the terms of the policy. So holding, I dissent from the foregoing ruling upon that point. The case should be reversed.

ÆTNA INSURANCE CO. vs. WILLIAM GRUBE.¹ (Supreme Court, Minnesota, December, 1861.) *Warranty. — Representation.*

Where it is stipulated in a policy of insurance against fire, that the same is made and accepted in reference to conditions annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties, and one of the conditions is, that if the policy is made and issued upon a survey and description of the property insured, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured: *Held*, that a written application signed by the assured, containing a survey and description of the property, was a *warranty* of the truth of such survey and description, and not a mere representation, and that if the survey and description were false, no recovery could be had upon the policy: that in case of *warranty* the parties stipulate the materiality of the matter warranted, and cut off all inquiry concerning it; — it must be true or there is no contract; that a *representation* may be untrue and a recovery be had upon the policy if its falsity is not material to the risk, which is always open to inquiry. But where the application contains the stipulation that

¹ 6 Minn. 82.

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the matters stated therein are a "just and true exposition of all facts and circumstances in regard to the condition, situation, and value of the property to be insured, *so far as the same are known to the applicant and material to the risk*," the warranty is qualified, and it becomes the duty of the company to show the materiality of any variances from the facts stated, as they would in case of representation. The effect and extent of the warranty must in all cases be governed by the manner in which the facts are stated in the contract.

GAHAGAN *vs.* UNION MUTUAL INSURANCE CO.¹ (Supreme Court, New Hampshire, December, 1861.) *Completion of Contract.*

The application, premium note, and policy, the latter signed, and the others not, were placed in the hands of the plaintiff a few weeks after their date, and were retained by him, without signing the application or note, or paying the premium, until after the loss. The policy having declared the application to be part of the contract, *held*, that the plaintiff could not receive and hold the policy as binding upon the defendants without recognizing and giving effect to the application.

R. W. DESILVER, for use, *vs.* STATE MUTUAL INSURANCE CO. SAME *vs.* SAME.² (Supreme Court, Pennsylvania, Philadelphia, 1861.) *Conditions annexed. — Notice of Loss.*

Conditions annexed to a policy of insurance have the same effect as if they were incorporated in the policy.

Under a condition in a policy requiring that "all persons insured and sustaining loss by fire shall forthwith give notice to the company," and as soon thereafter as possible "deliver a particular account of such loss, signed with their own hands and verified by oath or affirmation," a waiver by an agent of the company of notice of the loss does not include a waiver of the *particular account or proofs* required to be furnished.

SIMPSON *vs.* THE PENNSYLVANIA FIRE INSURANCE CO.³ (Supreme Court, Pennsylvania, Philadelphia, 1861.) *Other Insurance. — Waiver.*

Where an insurance policy provided that the party assured should with reasonable diligence give notice of all additional insurances made in his behalf, and of all changes that might be made in such additional insurances, and cause the same to be indorsed on his policy, and stipulated that unless such notice was given the insured would not be entitled to recover in case of loss, it was *held*, that a failure on the part of the insured to perform this condition was a bar to a recovery in an action on the policy.

Where no change was made in the aggregate of the sums insured, but there was a material alteration in the amount insured upon the different subjects, notice of this alteration was held necessary in order to render the company liable under a policy of insurance containing such a stipulation.

A waiver of the performance of a condition relative to notice of "changes made in additional insurances," cannot be inferred from the receipt of information of the mere fact of an additional insurance, where there was no intimation whatever given of any change.

¹ 43 N. H. 176.² 38 Penn. St. 130.³ 38 Penn. St. 250.

Additions. — Construction of Terms. — Notice of Loss.

WEST BRANCH INSURANCE CO. vs. HELFENSTEIN.¹ (Supreme Court, Pennsylvania, Sunbury, 1861.) *Change of Title. — Notice of Loss. — Assignment.*

The law of the relation between insurers and the assured, is the policy of insurance, with all its clauses, conditions, and stipulations, by which their mutual rights and liabilities are defined and measured.

In a policy obtained by a merchant upon his storehouse, and upon his stock of goods therein, each for a certain sum, there was a condition that "in case of any transfer, partial transfer, or change of title in the property insured, such insurance shall be void and of no effect," &c. He afterwards sold a part of his stock, without notice to or with the consent of the company, and leased the lower story of his store to the purchasers, occupying himself the second story and the cellar with the balance of his stock, which at the time of the fire exceeded in value the insurance obtained on his goods. *Held*, that he had not forfeited his right to indemnity by failing to give notice of the partial sale, but was entitled to recover the amount of his insurance, it being upon merchandise, which is to be used for traffic and commerce, and not as property to be kept unchanged.

The admission under lease of the purchasers of part of the stock, to the joint possession of the store building, was not a breach of the covenant; for the condition forbidding the transfer or change of title in the property insured, without the assent of the company, does not include a lease which changes only the possession.

Where notice of the loss was required to be given to the secretary of the company by the assured, in writing, a written notice to the secretary from the local agent, upon information conveyed to him by the assured, is sufficient.

A condition that notice of the loss be given to the company forthwith, requires from the assured due diligence under all the circumstances of the case; therefore, notice of a fire at T. on Saturday, given verbally to the local agent at S., twelve miles distant, and by him communicated to the secretary at L., seventy miles distant, within five days after the fire, on the following Wednesday, is a substantial compliance with the requirement of the policy, and is in time.

Where the company had been notified to produce upon the trial the letter written by their local agent at S., giving information of the fire, and had refused, it was competent for the plaintiff to prove the contents of the letter by the agent himself.

Where the assured, four years after the loss occurred, had made an assignment for the benefit of creditors, it was not an error in the court below to reject the assignment, when offered in evidence by the defendant, to show the breach of a condition forbidding the transfer of a policy or a claim thereunder, either prior or subsequent to a loss, except by the consent of the company; for after a right of action for a loss has accrued, no condition in the policy could prevent a subsequent assignment of the claim. The legal effect of the claim cannot be limited by such a condition; the right to receive the insurance became a *chose in action*, and as such was assignable, and, if applicable, the condition was null and void, because contrary to law.

LYCOMING COUNTY INSURANCE CO. vs. UPDEGRAFF.²

(Supreme Court, Pennsylvania, Sunbury, 1861.)

Additions. — Construction of Terms. — Notice of Loss.

A firm took out a policy of insurance upon merchandise contained in a "new frame barn, wagon, and wareroom," situated on an alley and occupied for a warehouse, and subsequently assigned their interest in the policy and property insured to others, who erected a brick addition of their storeroom (which was built upon the front of the lot, on the

¹ 40 Penn. St. 289.

² 40 Penn. St. 311.

 Additions. — Construction of Terms. — Notice of Loss.

rear of which the frame barn was erected), extending it back to the alley, and requiring the removal of part of the barn: afterwards, the new building, and the remnant of the frame barn, with their contents, were destroyed by fire. In an action against the insurance company for the insurance upon the goods in the remnant of the barn and in the brick extension, it was *held*, that no recovery could be had, under the policy, for any loss of goods in the new brick building or extension of storeroom, and, if at all, only for those contained in the remnant of the frame barn and wareroom as originally erected and insured.

Where by indorsement on the policy at the time of building the brick extension it appeared that the insured had given their note for "carpenter's risk, and had paid five per cent. upon it, and upon the foot of the note a memorandum, that it was for additional risk in extending storeroom, the indorsement and memorandum cannot be construed into consent by the insurance company that any part of the frame barn should be torn down, or into any engagement to insure goods in the extension of the storeroom; they amount to consent only that the storeroom on the front of the lot might be extended, thus increasing their risk, and were neither consent or evidence of consent that the frame barn might be extended, or that a part of it might be taken away.

By a condition in the policy, the insured were bound, in case of loss by fire, to forthwith give notice to the secretary, and within thirty days after loss to deliver to the secretary a particular account of such loss or damage. An account was sent by mail to the secretary, setting out the names of the partners, the number of their policy and amount insured therein, the value of their stock in the store as estimated from their books, and reciting insurances in two companies (the store in front and its brick extension having been insured by another company), giving an account of an entire undivided loss, and claiming it to be embraced in the policies of the two companies, but without stating the amount of the loss or damage upon the policy of the insurance company defendant, nor that the loss was upon goods insured under that policy, nor in what way that loss was ascertained. *Held*, that the account sent was not such a particular account of the loss and damage as was required by the policy.

Where the president of the insurance company defendant, when examining the books of the plaintiffs to ascertain the loss of goods in the store, was applied to by them for instruction how to make out their statement, and gave a memorandum in pencil, without date or signature, of what it should contain, neither the examination of the books nor the memorandum were evidence that the requirements of the policy in relation to a particular account of the loss had been waived by the company: the memorandum given to plaintiffs by which to make out their statement was, in effect, a demand of compliance with the terms of the policy; and it was error in the court below to instruct the jury that the giving of the memorandum was such an act as would waive the requirements of the policy, or that there was any evidence of a waiver whatever.

ERROR to the common pleas of Lycoming County. This was an action of covenant on a policy of insurance brought in the common pleas to August term, 1858, by A. Updegraff, A. A. Winegardner and William Updegraff, late partners, trading as Updegraff, Winegardner & Co., for the use of J. H. Fulmer & Co., against the Lycoming County Mutual Insurance Company.

The material facts of the case are as follows:—

The company, on the 29th October, 1853, issued a policy of insurance to Updegraff, Winegardner & Co., insuring \$3,000 on "stock of merchandise as described in their application," viz.:

"For merchandise owned and occupied by said A. Updegraff, Winegardner & Co., and the contents contained in the said barn,

wagon, and warehouse, owned by A. A. Winegardner, situate in the borough of Williamsport, Lycoming County, Pennsylvania, on the corner of Sugar and Tom Alley, valued at \$3,000. For a further description of said warehouse, &c., see application of A. A. Winegardner of same date for insurance on the same."

"Contents to be insured as follows: Sugar, salt, coffee, iron, steel, and other heavy articles of merchandise, wagons, horses, &c. A good well of water, with pump in yard."

The application of A. A. Winegardner, merchant, for insurance, was on "a new frame barn, wagon, and wareroom owned by said Winegardner, and occupied by Updegraff, Winegardner & Co., for warehouse, &c., situate in the borough of Williamsport, Lycoming County, Pennsylvania, on the corner of Tom and Sugar Alley, front on Tom Alley, 52 by 30 feet; back part on Sugar Alley, 20 by 20 feet; adjoining is a pigsty and hen-coop, 10 by 10 feet; all two stories high, well finished and in good repair — valued at \$650; 2 feet, a frame wood-house adjoining the brick candy shop manufactory; east 10 feet is the new frame barn of R. Farris, Esq.; south, is Tom Alley; west, is Sugar Alley; a good well of water, with pump in yard."

On the 29th of April, 1854, Updegraff, Winegardner & Co. assigned their interest to Ralph Elliott and J. H. Fulmer. March 6, 1856, Ralph Elliott transferred his interest to J. H. Fulmer, and May 11, 1857, J. H. Fulmer transferred to J. H. Fulmer & Co., the plaintiffs below.

The building which contained the insured property was on the rear end of the lot facing Tom Alley, and was used and occupied only as a warehouse and wagon shed.

On the front of the same lot, facing Third Street, was a brick storeroom, occupied by the plaintiffs for the sale of ordinary country merchandise, extending back towards the frame "barn, wagon, and warehouse," and separated from it by vacant or unoccupied ground for a distance of eighty-one feet.

On the general merchandise contained in this storeroom, Updegraff, Winegardner & Co., the 24th March, 1853, effected insurance for one year in the Franklin Fire Insurance Company, of Philadelphia, for \$10,000, which was continued and transferred by indorsements to the present plaintiffs.

This insurance was in the following words: On "merchandise, such as is usually kept in country stores, contained in a three

story brick building on the southeast corner of Third Street and Sugar Alley, in the town of Williamsport, Lycoming County, Pennsylvania, with privilege to erect a brick dwelling on the back part of the lot adjoining the above named building in the rear."

The following indorsement was made on this policy of the Franklin Company, July 24, 1853: "Elliott & Fulmer, the assignees of the within policy of insurance, having permission to make an addition to the building in which the goods insured are contained, running back to the alley for 81 feet one story high, and 80 feet two stories high, and both 22 feet wide, making the total length of addition 111 feet; after completion no goods to be kept on second story. This addition to be without prejudice to the within policy. After the addition above mentioned, all the goods on the second story to be at the risk of Elliott & Fulmer.

"By direction of the company, &c.,

"July 24th, 1855.

C. W. Scates, *Agent.*"

On the 16th July, 1855, the following indorsement was made on the policy of the Lycoming Insurance Company:—

"This is to certify, that the insured in the within policy have given their note for one hundred and fifty dollars for carpenter's risk at 5 per cent.; and have paid on the same \$7.50, being 5 per cent on note.

"Survey, 50 cents — paid.

Robert Pott,

"Agent Lycoming County Mutual Insurance Company.

"Williamsport, July 16th, 1855."

The note referred to is as follows:—

"\$150. For value received in policy No. 34,734, which expires the 1st day of October, A. D. 1858, issued by the Lycoming County Mutual Insurance Company, I promise to pay the said company or their treasurer, for the time being, the sum of one hundred and fifty dollars, in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require, including unpaid assessments.

"Witness our hands, at Williamsport, in the county of Lycoming, the 6th day of July, 1855.

"Additional risk — improvements in extending storeroom.

"Elliott & Fulmer."

In July, 1855, the work of extending the storeroom was commenced. It was 22 feet wide, and covered the 81 feet of vacant

ground between the store and the "barn, wagon, and warehouse," and to make room for its further extension to the alley, the "barn, wagon, or warehouse" was cut down and entirely removed for a width of 22 feet, and an entirely new brick building erected on its site, constituting an extension of the store in one continuous room 22 by 111 feet, without any partition or division whatever, thus throwing the whole from Third Street to Tom Alley into one open storeroom 208 feet long.

Sixteen feet of the original "barn, wagon, and warehouse" remained; making a room 16 by 30 feet, in which was stored old barrels, iron, coal, &c., the whole of which is valued at \$307.50.

The whole balance of the claim of \$3,000 was contained in the new brick extension of the storeroom erected partly on the place of the barn removed.

On the morning of April 7, 1858, a fire broke out under the office in the new building, about 100 feet from the alley and about 70 feet from the upper line of the "barn, wagon, and warehouse."

The day after the fire, James Rankin, the President of the Lycoming Insurance Company, who happened to be in town, visited the ruins. A few days after, one of the firm brought the firm's books to the hotel. "Mr. Robinett, an agent of the Franklin Fire Insurance Company, received them with Dr. Rankin, with a view to ascertain the loss of goods in the whole store of Fulmer & Co."

It did not appear that Dr. Rankin was present at the fire, or made any examination of books in pursuance of any notice to the company or in any official capacity.

The 13th April, 1858, the following statement of loss was mailed, addressed to James Rankin, President of the Lycoming Company: —

"Williamsport, Pa., April 13th, 1858.

"James Rankin, President of the Lycoming County Mutual Fire Ins. Co.: J. H. Fulmer & Co., of Williamsport, Pennsylvania, who are insured in the above named company by policy No. 34,734, to the amount of three thousand dollars (\$3,000) on goods, furnish the following statement to the said company, which is as particular an account of their loss and damage by the fire which occurred on the morning of the 7th of April, inst., as the nature of the case will admit of:

Additions. — Construction of Terms. — Notice of Loss.

"The fire was first discovered between three or four o'clock in the morning, near the centre of the store. We are entirely unable to account for the origin of the fire. The firm of J. H. Fulmer & Co. consists of Jacob H. Fulmer, C. A. Stancliffe, Joseph H. Wonderly, and Jacob W. Hyman. The stock of goods was entirely consumed. The value of our stock at the time of the fire, as ascertained from the books, which were examined on the 13th instant by Dr. Rankin, for the Lycoming County Mutual Fire Insurance Company, and by Mr. Robinett, for the Franklin Fire Insurance Company of Philadelphia, was \$14,429.78. This sum was arrived at as follows:

"Amount of inventory in January, 1858, and purchase from January, 1858, to April 6th, 1858 .	\$26,151.78
"Amount of sales from January, 1858, to April 6th, 1858, \$13,671, on which was a presumed profit of \$1,662, deducted from \$13,671, equals . .	\$11,722.00
	\$14,429.78

"The only insurance on our stock of goods were three thousand dollars (\$3,000) in the Lycoming County Fire Insurance Company, as above stated, by policy dated the 29th of October, 1853, to expire on the 1st day of October, 1858, and ten thousand dollars insured in the Franklin Insurance Company of Philadelphia, by policy No. 147,547, dated the 24th of March, 1853, and renewed on the 23d of March, 1858, to expire the 24th of March, 1859."

"The policies were both taken originally in the name of Updegraff, Winegardner & Co., and by various assignments regularly transferred to us.

"Sworn to by

"J. H. FULMER.

"H. HENPERLY.

"GEORGE AGOLE."

The following paper was also produced, written in lead pencil, without date and without signature, proved to be in the handwriting of James Rankin: —

"State amount of indebtedness, and on what policy; then state in what way the amount of loss is arrived at; state who are the partners; state what insurance may be in any other company; state whether all assessments demanded have been paid."

The company defendant claimed: That they had no knowledge of, and never assented to the demolition of the "barn,

wagon, or warehouse," or any part of it, and that their policy did not cover any goods contained in the new building, which was an extension of the storeroom; that the policy was vitiated by an unauthorized destruction of the greater part of the building in which the goods covered by the insurance were contained, and did not, therefore, cover even the \$307.50 worth of coal, iron, &c., remaining in the barn in the space 16 by 20 feet not removed; and requested the court to charge the jury:—

1. That the policy, under which the plaintiffs' claim, covered only such merchandise as was contained in a "frame barn, wagon, and warehouse" 30 by 52 feet on Tom or Black Horse Alley, and defendants are not liable for the loss of any goods not contained in such building.

2. The new brick building was not, within the meaning of the policy, an addition nor alteration of the frame barn, wagon, and warehouse, 30 by 52 feet, but was, in contemplation of law, essentially an independent structure not embraced within the policy, and the defendants are not liable for the loss of any goods or merchandise which it contained.

3. The plaintiffs having, without the consent of the company, removed 22 feet of the frame barn, wagon, and warehouse, 30 by 52 feet, on Black Horse or Tom Alley, and having erected a new brick building extending from the rear of the store on Third Street to said alley, and covering the site of that part of the frame barn, wagon, and warehouse so removed, varied the character of the risk insured; and that the fire having originated in the new building beyond the limits of the frame barn, wagon, and warehouse, and communicated to the remaining part of the said frame barn, wagon, and warehouse, through and by reason of the said new building, is conclusive upon the jury that the hazard was thereby increased and the plaintiffs cannot recover.

4. That the certificate indorsed on the policy that the assured have given their premium note for \$150 for "carpenter's risk," taken in connection with the said note, which recites that it was given for "additional risk in extending storeroom," did not authorize the removal of that part of the frame barn, wagon, and warehouse, 30 by 52 feet, which was removed; nor the erection in place thereof of the new brick building which was afterwards erected, and cannot be construed to extend the liability of the

defendants to the goods or merchandise contained in said brick building.

5. That there is no evidence that the plaintiffs after the fire forthwith gave notice to the secretary of the defendants of their loss, as required by the conditions of the policy, and that there is no evidence that the defendants ever waived or dispensed with such notice.

6. That the paper dated April 13, 1858, directed and mailed to the president of the company, was not such a particular account of the plaintiffs' loss as was required by the policy, and that the paper in the handwriting in pencil of James Rankin, neither purports to be, nor was, an official act of the company, nor was said Rankin authorized to waive the requirement of the policy in relation to such particular account of loss; and the said paper of 13th April, 1858, is not in accordance with said pencil memoranda.

7. That the paper dated April 13, 1858, put in evidence by the plaintiffs, admits that the plaintiffs had additional insurance on the merchandise for the loss of which they now claim, and as the aggregate insurances are greater than the same allowed to be insured by the defendant's policy, the plaintiffs cannot recover.

8. That the allowance of the carpenter's risk to Elliott & Fulmer, indorsed upon the policy of the plaintiffs, expired upon the transfer of the policy to J. H. Fulmer & Co.; and there being no authority to the latter to change the character of the building in which the merchandise was insured, the plaintiffs cannot recover as the merchandise destroyed was not in the building insured.

The court, after stating the case, charged the jury as follows:—

“The evidence in this case shows that a fire occurred at the time already stated, which consumed the buildings then occupied by J. H. Fulmer & Co., for merchandising, and their stock of goods, with the exception of a few articles that were saved. The insurance in this case was effected on property estimated at \$4,500, two thirds of which sum the plaintiffs seek to recover in this action.

“The kind of property insured is stated in the application and the policy of insurance, which are in evidence. The insurance was effected at a time when the property insured was in a building which was afterwards removed, and another substituted in its stead.

“The several grounds of defence are embodied in the points presented by the counsel of the company to the court, which we answer as follows:—

“1. The defendants are not to be allowed for the loss of any goods not contained in the building described in the application and policy.

“2. This we answer in our answer to the fourth point.

“3. If the plaintiffs, without the consent of the company, removed 22 feet of the frame, wagon, and warehouse, 30 by 52 feet, on Black Horse or Tom Alley, and having erected a new brick building, extending from the rear of the store, on Third Street, to said alley, and covering the site of that part of the frame barn, wagon, and warehouse, so removed, did vary the character of the risk insured; we cannot say to you that the plaintiffs did, without the consent of the company, remove the buildings mentioned in this point, but submit it to you as a question of fact, whether the fire originated in the new building, beyond the limits of the frame barn, wagon, and warehouse, and communicated to the remaining part of the said wagon and warehouse through and by reason of the said new building, and whether these facts are so, and whether, thereby, the hazard was increased, is submitted to your determination. If the alterations or additions mentioned in this point were made without the knowledge and consent of the company, and the hazard was thereby increased, the plaintiffs cannot recover.

“4. On the 16th of July, 1855, there is indorsed on the policy a certificate, by the agent of the company, in the following words: ‘This is to certify, that the insured in the within policy have given their note for \$150 for carpenter’s risk, at 5 per cent., and have paid in the sum of \$7.50, being 5 per cent. on the note.’ The note given by Elliott & Fulmer at the same time has these words: ‘Additional risk for improvement in extending storeroom.’ The word ‘extending’ does not, in the opinion of the court, mean the removal or destruction of a building, but an increase in size of the old building, and cannot be construed to extend the liability of the company to the goods or merchandise contained in said brick building. The court having given you the meaning of the word ‘extending,’ as found in the note referred to, submit to you to determine, from the evidence, whether what was done was an extension of this storeroom, or removal of the old one in part, and

was in the contemplation of the parties at that time ; and whether the building put up and the removal of parts of the building were or were not done by permission of the company.

“ 5 and 6. We cannot give the instruction here requested. There is evidence that the president of the company was at the scene of the fire soon after it occurred, and made an examination of the plaintiffs' books ; that a paper, a statement, dated April 13, 1858, was mailed and addressed to the president of the company, through the post-office, and that it came into the hands of the secretary, was before the board of directors, and was in the custody of the secretary as an office paper. This paper is not such a particular account of the plaintiffs' loss as was required by the policy, and the paper in the handwriting of James Rankin does not purport to be an official act, but was such an act as would waive the requirements of the policy. But the jury must take into consideration the whole evidence bearing on these points. The court are of opinion that the president might waive the notice and the statement required by the policy, and submit it to you to determine whether he did so waive it. If the statement required by the policy was not waived by Dr. Rankin, but was required by him, and if such statement was not furnished within the time required, plaintiffs cannot recover.

“ In the memorandum made by Mr. Fulmer, at the request of Dr. Rankin, the indebtedness is set out, and on what policy, and the way the amount of the entire loss sustained by plaintiffs was ascertained is set out, but not the amount of indebtedness, and on what policy, and it is not stated in what way the amount of loss which is claimed from the company is arrived at, and in these particulars it is not in accordance with the pencil memorandum.

“ 7. The paper of the 13th April, 1858, admits that the plaintiffs have insurance on merchandise, or on their stock of goods, to the amount of \$3,000 in the Lycoming County Insurance Company, and \$10,000 in the Franklin Insurance Company, but we cannot instruct you that that paper admits that the plaintiffs had additional insurance on the merchandise, for the loss of which they now claim, and that as the aggregate insurances are greater than the sum allowed to be insured by the defendants' policy, the plaintiffs cannot recover. If the facts are stated in this point, the instruction asked would be given if it appeared that the aggregate insurance, at the time the insur-

ances were effected, were greater than the sum allowed to be insured.

“ 8. The carpenter's risk increased is indorsed on the back of the policy, July 16, 1855, when a note was received. This was assigned to J. H. Fulmer, March 6, 1856; to J. H. Fulmer & Co., March 11, 1857; and to J. H. Fulmer, May 11, 1857. On the 6th of March, 1856, a receipt of the company was given in evidence, for assessment No. 12, \$21; and on the 12th May, 1857, a receipt for assessment No. 14, \$18, and additional, \$6. Mr. Bowman states that their assessments were made 11th May, 1857, and that that assessment was due by J. H. Fulmer, and would not be an assessment made on the assignment of May 11. Fulmer & Elliott paid the carpenter's risk, \$150, and when Fulmer took the policy he gave no note for the increased risk. The court cannot instruct you, under the evidence in the cause, that the carpenter's risk, as it is called, expired upon the transfer of the policy to J. H. Fulmer & Co., and that being the opinion of the court, you must determine whether the character of the building in which the merchandise was insured was changed, and, if it was changed, whether it was by consent or permission of the company; for if it was, plaintiffs are not prevented for this reason from recovering. But if no authority was given to change the character of the building, the company would not be liable.”

Under these instructions, there was a verdict and judgment in favor of plaintiffs for \$2,544.21, whereupon the defendants sued out this writ, and assigned for error the following matters, viz.: —

I. (1.) The court erred in submitting to the jury as a question of fact whether or not the company assented to the removal of the twenty-two feet, &c., of the building referred to, and the substitution of the new buildings in its place, there being no evidence whatever to show that the company did consent to any such change of the premises in which the merchandise insured was contained, or to a removal of the property insured to the new brick store.

(2.) The evidence in the cause, which was not disputed, having established the fact that the fire originated in the new buildings beyond the limits of the frame buildings in which the merchandise was insured, and the loss having been occasioned by

reason of the erection of such new buildings, the court erred in submitting to the jury, as a question of fact, whether or not the hazard was thereby increased.

II. The court erred in allowing the jury to determine "whether what was done was an extension of the storeroom or removal of the old one in part, and was in the contemplation of the parties at that time, and whether the buildings put up and the removal of parts of the buildings were or were not done by permission of the company." There was no evidence to vary the terms of the indorsement on the policy and the additional premium note; these together constituted a written contract, the construction and meaning of which were to be determined by the court alone. The court should have instructed the jury clearly that the defendants were not liable for any merchandise in the new brick building, and confined their inquiry specifically to the loss of merchandise in what remained of the frame barn.

III. (1.) The court erred in instructing the jury that "the paper in the handwriting in pencil of James Rankin, which does not purport to be an official act, was nevertheless such an act as would waive the requirement of the policy," which rendered it obligatory on the part of the insured to deliver to the secretary, within thirty days after loss, a particular account of such loss or damage.

(2.) The court having instructed the jury that the "paper dated April 13, 1858, is not such a particular statement of the plaintiffs' loss as was required by the policy," and having further instructed them that the "paper in the handwriting of James Rankin does not purport to be an official act," and having further instructed them that the statement "is not in accordance with the pencil memoranda," should have instructed them that the plaintiffs could not recover.

IV. The court erred in their answer to the defendants' seventh point, because the paper of the 13th April, 1858, was presented by the plaintiffs to the company as and for a compliance with the requirements of the policy; and as it was not alleged or proven that said paper originated in any mistake, the plaintiffs were estopped from denying the statement therein made to the company; and as it appears upon the face of the paper that the property now claimed for was insured in two companies, and for a greater amount than was authorized by the terms of the policy, the plaintiffs were not entitled to recover.

V. The court erred in submitting it to the jury to determine "whether the character of the building was changed by consent or permission of the company." There was no evidence of any such consent unless it could be found in the indorsement upon the policy, and the note for the "additional risk for extending storeroom," the construction of which, as a modification of the contract, was a question of law for the determination of the court.

VI. The court erred in permitting the plaintiffs to recover for any merchandise contained in the new brick building, and by inconsistent charges which misled the jury.

The seventh assignment of error related to the admission in evidence of the statement of loss dated April 13, 1858, and the rejection of evidence as to the extent of the plaintiffs' claim, and the fact that their statement had been rejected by the board of directors, but it was not noticed by the court.

The opinion of the court was delivered, November 11, 1861, by

STRONG, J. It is quite extraordinary that under a policy of insurance upon merchandise, contained in a building particularly described, a recovery has been permitted for a loss in another building, erected in part upon the site of the one in which the goods were insured. Yet such is the case now before us. The assignors of the plaintiffs below, under whom they claim, took out a policy with the defendants upon merchandise contained in a "new frame barn, wagon, and wareroom," occupied by them for a warehouse, &c., situate in the borough of Williamsport, Lycoming County, Pennsylvania, on the corner of Tom and Sugar alleys; front on Tom Alley 52 by 30 feet; back part on Sugar Alley, 20 by 20 feet." On the other end of the same lot, and distant 81 feet from the "frame barn," was a brick storeroom, containing a stock of goods which the assignors of the plaintiffs had previously insured with another company. While the policy of the defendants was running, the assured demolished a portion of the "frame barn, wagon, and wareroom," and erected a brick extension of the storeroom, 22 feet in breadth and 111 feet in length, reaching entirely through the lot to Tom Alley, and covering 30 by 22 feet of the ground upon which the "frame barn," &c. has stood. The new building and the remnant of the frame barn, with their contents, were afterwards destroyed by fire, and the plaintiffs sought to recover, under their policy with the defendants, for the

loss of the goods contained in the extension of the "storeroom," as well as for the loss of those contained in the remnant of the "frame barn." In the court below their attempt was successful, and this without any fault of the defendants. The learned judge evidently misapprehended an indorsement on the policy, and a clause in the premium note. The indorsement certified that the insured had given their note for \$150, for carpenter's risk, at five per cent., and had paid on the same \$7.50, being five per cent. on the note. At the foot of the premium note were the words, "Additional risk in extending to storeroom." This certificate, with the memorandum on the note, the court was asked to say, did not authorize the removal of that part of the frame barn which was removed, nor the erection of the new brick building in its place, and could not be construed to extend the liability of the defendants to the goods or merchandise contained in said brick building. This point was not correctly answered. What the court said in regard to it was well fitted to mislead the jury. They were told that the word "extending" does not mean the removal or destruction of a building, but an increase in the size of the old building, and cannot be construed to extend the liability of the company to the goods or merchandise contained in said brick building. The learned judge then proceeded as follows: "The court, having given you (the jury) the meaning of the word extending, as found in the note referred to, submit to you to determine, from the evidence, whether what was done was an extension of this storeroom, or removal of the old one in part, and was in the contemplation of the parties at that time; and whether the building put up, and the removal of parts of the building, were or were not done by permission of the company." In our opinion this was an inadequate and erroneous answer to the point proposed. Neither the memorandum on the note, nor the indorsement on the policy, nor both together, can be construed into consent of the defendants to the demolition of any part of the frame barn, wagon, and wareroom, much less into any engagement to insure goods in the extension of the storeroom, or in the new building. The memorandum on the note was at most but a consent that the "storeroom" on the other end of the lot might be extended, which would necessarily increase the hazard by bringing buildings nearer the property insured. It was neither consent, nor evidence of consent, that the frame barn might be

extended, or that a part of it might be taken away. The jury should have been unqualifiedly instructed that the plaintiffs could not recover for any loss of goods in the new brick building, or extension of the storeroom, and that there was nothing in the indorsement on the policy, or in the memorandum on the premium note, that warranted such a recovery.

But even though there was no consent to an alteration of the frame barn, we do not feel prepared to say that the plaintiffs might not recover for the loss on the goods contained in what remained of it, notwithstanding the alteration. The alterations which it was stipulated should avoid the policy were such as increased the hazard without consent of the company. The court could not say, as a legal deduction from the facts, that the hazard was not increased with the consent of the company. There was a consent to the extension of the storeroom, and the fire commenced in that. The increased hazard was occasioned rather by that extension than by the alteration ; at least whether it was or not was for the jury.

We need say no more respecting the first, second, fifth, and sixth assignments of error.

The third and fourth assignments relate to the particular account of the loss and damage which, according to the conditions of the policy, the assured were under obligations to furnish to the secretary of the company within thirty days after the loss. We concur in opinion with the learned judge of the common pleas, that the paper which was furnished to the president of the company, dated April 13, 1858, was not such a particular account of the loss as was required by the policy. It was the only account ever furnished. But we dissent from the opinion of the court that there was any evidence that the requirements of the policy was ever waived. The memorandum of Dr. Rankin, given to the assured, instead of being a waiver was the opposite. It was in effect a denial of compliance with the terms of the policy. Nor can the examination of the books of Mr. Fulmer, in company with the agent of the Franklin Insurance Company, be treated as any evidence of waiver. That was an examination to ascertain the loss of goods in the whole store. And it was not understood by the assured to be a waiver. They asked for instruction how to make out their statement, and were given to understand that a particular statement was necessary. They

undertook to comply. How it can now be claimed that they were released from the obligation to furnish it, we cannot discover. We think the fifth point of the defendants should have been affirmed.

Judgment reversed, and a venire de novo awarded.

COMMONWEALTH INSURANCE CO. vs. SENNETT *et al.*¹ (Supreme Court, Pennsylvania, Pittsburg, 1861.) *Preliminary Proofs. — Evidence. — Waiver.*

Preliminary proofs, though a condition precedent to the right of the insurer to recover, may be waived, and hence are only important when made so by the conduct of the insurers, for whose security and information they are required.

Though the insurer do not object to the regularity of the preliminary proofs, yet the insured cannot prove his loss or the particulars of it by his own statement; he cannot make evidence for himself.

Where the court permitted the schedule, statements, and affidavits of the plaintiffs relating to their loss to be read, not only to prove compliance with the conditions of the policy as to preliminary proof, but to go to the jury as *prima facie* evidence of the goods lost, as to quantity and quality, but not as to value, it was error; for, there being nothing in the policy making these papers evidence *per se*, they were not evidence of the goods lost, and should not have been read to or sent out with the jury.

It is not necessary to prevent such use of the schedule and statements, that issue be taken or notice given before the trial, that their correctness would be called in question.

The preliminary proofs and their sufficiency are for the court; if not sufficient the cause is at an end, unless they have been expressly or impliedly waived by the defendants.

The rule is that if the preliminary proofs are waived or are sufficient, such waiver, or sufficiency, in effect strikes the condition requiring them out of the contract.

BROWN *et al.* vs. COMMONWEALTH MUTUAL INSURANCE CO.² (Supreme Court, Pennsylvania, Pittsburg, 1861.) *Construction. — Incumbrances. — Liens.*

In a policy for insurance, used for insuring both real and personal property, a condition that if, during the life of the policy, an incumbrance fall or be executed upon the property insured, sufficient to reduce the real interest of the insurer to or below the value of the property, without the consent of the insurance company, the policy shall be void, applies to both kinds of property, and means that the owner's interest shall not be reduced by incumbrances below the amount insured without notice to the company.

Upon such notice of liens upon the property insured, the company would have the right to rescind the policy on repayment of a proportionate part of the premium.

Where the insured had liens upon their property to a large amount before purchasing the policy, and during its life heavy judgments were entered against one or the other of them, to an amount beyond the value of the property, without notice to or consent by the company, a material covenant of the policy was thereby violated by the insured, and they were not allowed to recover.

After notice of liens against his property has been given by the insured to the insurance company, their consent to stand as insurers would be implied if there was no dissent.

Where the court referred the questions of fact to the jury, instructing them that if they

¹ 41 Penn. St. 161.

² 41 Penn. St. 187.

Rebuilding.

believed the evidence of incumbrances upon the property insured both before and after the date of the policy, their verdict should be for the defendant, it was *held*, not to be error.

ÆTNA INSURANCE CO. vs. WILLIAM PHILPS.¹

(Supreme Court, Illinois, January Term, 1862.)

Rebuilding.

The right to rebuild given an insurance company by the policy is a condition subsequent, and the insured in declaring on the policy need not negative the performance of it.

THE case is stated in the opinion.

WALKER, J. It is urged that the declaration in this case was insufficient, and that the court below erred in overruling the defendant's demurrer. The policy upon which suit was brought contains this, amongst other provisions: "In case of any loss on, or damage to, the property insured, it shall be optional with the company to replace the articles lost or damaged, with others of the same kind and equal goodness; and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty days after preliminary proof shall have been received at the office of the company." It is insisted, that the declaration is substantially defective, for the want of an averment negating this clause. By the common law rules of pleading, in declaring upon a bond with a condition annexed, breaches were alone required to be assigned upon the bond. If there had been a performance of the defeasance or condition, it was held to be matter of defence. And this is certainly true of all conditions subsequent. 1 T. R. 640. It is, however, otherwise, with conditions precedent. Gould in his Treatise on Pleading, 177, states the rule thus: "It is never necessary by the common law for the plaintiff, in his declaration, to state or in any manner to take notice of any condition subsequent annexed to the right he asserts. For the office of such condition is not to *create* the right on which the plaintiff founds his demand; but to *qualify* or *defeat* it. The condition therefore, if performed or complied with, is matter of defence, which it is for the defendant to plead."

In this case the defendant in error became, according to the covenants contained in the policy, entitled to recover at the time the loss occurred. But by this condition the company had the right

¹ 27 Ill. 71.

Completion of Contract.

to defeat the recovery, by rebuilding the property destroyed. If they performed this subsequent condition, they should have pleaded the performance. This condition was inserted solely for the benefit of the company; its performance was to be subsequent to any loss which might occur, and after notice of that fact, and was purely a matter of defence. *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455, *ante*. *Judgment affirmed.*

JAMES N. BUFFUM vs. FAYETTE MUTUAL FIRE INSURANCE Co.¹

(Supreme Court, Massachusetts, January Term, 1862.)

Completion of Contract.

If the by-laws of a mutual insurance company provide that "each person, before the policy shall be binding on the company, shall pay to the treasurer or agent such premium, and make such deposit as the directors shall determine," the company is not rendered liable on a policy which is executed but not delivered, and for which no premium has been paid, by an oral promise of their treasurer to the applicant for insurance that, if anything should happen, he would see the premium paid, or that he would take it upon himself to keep the policy good.

CONTRACT upon a policy of insurance executed upon the application of Wilson and Allen, as owners of the premises insured, and payable to James N. Buffum, as mortgagee, in case of loss.

At the trial in the superior court, it appeared that the policy was never delivered, by reason of the non-payment of the premium, and, upon evidence which is stated in the opinion, Ames, J., ruled that the plaintiff was not entitled to recover, and a verdict was returned for the defendants, and the plaintiff alleged exceptions.

CHAPMAN, J. The fourteenth by-law provides that "each person, before the policy shall be binding on the company, shall pay to the treasurer or agent such premium, and make such deposit as the directors shall determine." It appears by the testimony of Allen, one of the owners of the property described in the policy, that he had been unable to raise the money to pay the premium, and had obtained the assent of the president and treasurer to repeated delays, extending from January to April. He then called on Chadwick, the treasurer, and said to him, "I have called to see about the policies, and want to extend the time to the first days of May, when I shall have funds." Chadwick answered, "I

¹ 3 Allen, 360.

Completion of Contract.

don't know what I can do." Allen said, "If I must, I will go out and borrow the money. At any rate, I don't want the policies vitiated." Chadwick replied, "No, I will take the responsibility; and if anything happens, I will see the premium paid." Allen thanked him. Chadwick said, "Now you understand that if anything happens, the responsibility stands on me, and you must take care of me." The fire occurred on the 2d of May, and Allen tendered the premium on the 2d of August. On cross-examination, Allen stated the matter somewhat differently. "Chadwick said he would take it upon himself to keep the policies good, if I would pay him in the first part of May." The evidence should have been submitted to a jury, if, by any fair construction of this conversation, it could have been construed by them to amount to a payment. But it cannot be thus construed. Nothing was actually received, nor did Chadwick make himself liable to the company, so that they could have charged the sureties on his bond for the amount of the premium. By the first statement of Allen, it was an agreement to see the money paid if anything happened. It was thus contingent whether he should pay it or not. If nothing happened, the policy was, by the agreement, to continue without payment of premium. By the other statement, the promise was upon a condition which Allen did not fulfil. By the construction which the plaintiff would give to the transaction, the company would be bound to insure the property, and trust to Allen to pay the premium when he could. This would be unjust towards his associates; and the by-law referred to was designed to guard against such risks.

There is yet another view of the transaction. It is quite obvious that Chadwick did not, as agent of the company, agree that he would use their funds to pay this premium. But it was in his private capacity that he agreed to advance money. And, though he was treasurer, his private agreement would not bind the company. If he made a valid agreement in his private capacity, the remedy would be against him, if he violated it; and no claim against the company could arise out of it. As the statement of the conversation comes from Allen himself, we have knowledge that he understood the words as they are stated.

Exceptions overruled.

Unoccupied Building.

SAMUEL EDES *et al.* vs. HAMILTON MUTUAL INSURANCE Co.¹
(Supreme Court, Massachusetts, January Term, 1862.) *Mortgage.*

If the owner of property, which is insured by a policy which contains an express provision that the by-laws of the company are declared to form a part thereof, mortgages the same in violation of one of the by-laws, the policy is defeated; and no right of action thereon remains in favor of one to whom it had previously been assigned with the consent of the company, to secure a prior mortgage, if no new contract was made between such assignee and the company by which his interest was insured.

JAMES MULREY vs. SHAWMUT MUTUAL FIRE INSURANCE Co.
(Supreme Court, Massachusetts, January Term, 1862.) *Payment of Premium. — Waiver.*

A policy of insurance executed and delivered by a mutual insurance company is invalid unless the cash premium has been actually paid at the office of the company, if it contains an express stipulation to that effect.

Such stipulation is not complied with or waived by a payment of a premium to an insurance agent through whom the application was made, and the policy delivered, if the policy contains an express stipulation that every insurance agent, broker, or other person forwarding applications or receiving premiums is the agent of the applicant, and not of the company; although the company were in the habit of settling a monthly account with him, and he, after the loss, tendered the premium to them.

It seems, that the officers of a mutual insurance company have no power to waive a stipulation in a policy which has been executed and delivered, that no insurance shall take effect until the cash premium has been actually paid at the office of the company.

THURSTON PRIEST *et al.* vs. CITIZENS' MUTUAL FIRE INSURANCE Co.² (Supreme Court, Massachusetts, January Term, 1862.)
Preliminary Proofs. — Waiver.

An omission to make the formal preliminary proof of loss, under a policy of insurance, in compliance with the requirement of the by-laws, may be waived by the officers of a mutual insurance company, although the by-laws also provide that they "may be altered at any annual meeting, or at any legal meeting of the company called for that purpose."

Such waiver may be proved by evidence that one of the officers of the company made personal examination of the premises after the fire, in company with a person interested in the property; that afterwards, and within the time limited for making formal proof of loss, the secretary told the person to whom the amount insured was payable that no further proof of loss was necessary; that the directors, upon the informal proof, and within the time limited for making formal proof, passed a vote appointing a committee to adjust the loss; and that afterwards, in refusing to pay the loss, the refusal was put solely on other grounds.

WUSTUM vs. CITY FIRE INSURANCE Co.³ (Supreme Court, Wisconsin, January Term, 1862.) *Unoccupied Building.*

The policy in question required unoccupied buildings to be insured as such, and that immediate notice should be given when a building insured as occupied should be vacated. Nothing was said in the policy as to the occupation of the building insured; but the insurance agent knew that it was occupied. It was afterwards vacated and no notice was given. *Held*, that the insured could not recover.

¹ 3 Allen, 362.² 4 Allen, 116.³ 3 Allen, 602.⁴ 15 Wisc. 138.

Non-disclosure.

NIAGARA DISTRICT MUTUAL FIRE INSURANCE Co. (defendants), appellants, *vs.* THOMAS LEWIS (plaintiff), respondent.¹ (Common Pleas, Upper Canada, Hilary Term, 1862.) *Limitation Clause.*

In an action upon a policy of insurance, the defendants pleaded several pleas, and among them one traversing the delivery of a statement of loss, verified on oath within thirty days. It appeared the value of the premises destroyed was the only question after the fire, and to settle that, an arbitration was proposed, but did not take place, and the proofs were not sent in till the thirty days had expired. The judge in the court below having upheld a verdict against the insurance company upon appeal to this court, the decision was reversed, there being no evidence of waiver of the condition on the policy.

DAVIES OSSER, executor of McDonald, *vs.* THE PROVINCIAL INSURANCE Co.² (Common Pleas, Upper Canada, Hilary Term, 1862.) *Other Insurance.*

In an action on a policy of insurance, the defendants alleged that an additional insurance had been effected in another company without their being notified within a reasonable time, and in a proper manner, and without such notice being acknowledged by them, there being conditions indorsed upon their policy in accordance with these objections. It appeared that the notice of further insurance stated the amount to be larger than it really was, and gave the name of the company in which the further insurance was effected wrongly. *Held*, that inasmuch as the defendants were neither prejudiced nor misled by the mistake, and there did not appear to be, and was not alleged to be any fraud in so giving the notice, the policy was not thereby vitiated, and the plaintiff was entitled to recover.

PIMM *vs.* LEWIS.

(Nisi Prius, England, Hilary Term, 1862.)

Non-disclosure.

On a condition in a policy, that it should be void if the assured should *omit* to communicate any matter material to be made known to the insurer, *held*, that this meant some matter not only material, but also unknown to the insurers; and that it did not apply to something which it might well be presumed was known to them or their agents.

ACTION (against the Union Insurance Company) on a fire policy, the insurance being on the stock in trade in a water corn-mill.

[One of the articles was, that "*to prevent fraud*," if the assured should describe his buildings, manufactory, trade, or goods in any manner different from what they really are, so that the same be charged at a lower rate than they otherwise would be, or shall misrepresent, or *omit to communicate* any matter material to

¹ 12 Up. Can. C. P. 123.

² 12 Up. Can. C. P. 133.

³ 2 Fost. & F. 778.

Non-disclosure.

be made known to the company in order to enable them to judge of the risk, the policy should be void.]

Pleas: 1. Denying the making of the policy.

2. That the property insured was not truly described.

3. That the plaintiff omitted to communicate to the company a matter material to be made known to them, in order to enable them to judge of the risk, viz., that he was in the habit of grinding and would grind in the mill *rice chaff*.

4. That there was an alteration in the risk *near to the premises* insured, so as to increase the risk, viz., by storing rice chaff in or near to the premises insured.

The policy was effected in 1857. For some years previously part of the premises had been used as a mill for the grinding, not only of corn, but of the "offal" of corn, *i. e.* the pollard or finer part of the husk, and also of rice chaff, the husk of rice. In that year, however, and *after* the policy, the *other* part of the premises, previously used as a chocolate-mill, was applied to the grinding of rice chaff. The business had always been carried on openly and publicly, and it appeared to have been always known in the neighborhood that rice chaff was ground at the mill. One Barker, the agent for the company at the place where the mill was, went to look at the premises when the proposal was made; he made no particular inquiries, but appeared to know what the mill was. No questions were asked as to rice chaff, or what was ground at the mill, and no statement on that point was made by the assured. The proposal was simply to insure the stock in trade at the plaintiff's water corn-mill.

Hawkins contended that this was not a true description of a mill at which the offal of corn was ground, at all events, where *rice chaff* was ground. And he called scientific witnesses to prove that rice chaff was far more inflammable than pollard; and also officers of insurance companies to prove that the risk was on that account deemed greater and the premium required higher. But these witnesses only spoke from hearsay or vague impression, and the scientific witnesses only from analysis of the substance of rice chaff as compared with flour, not with pollard. There was no *practical* witness on behalf of the defendants to prove that the grinding of rice chaff was more perilous than the grinding of pollard, nor that a mill for the grinding of pollard as well as corn might not be fully and truly described as a corn-

Loss or Damage by Fire. — What is.

mill. On the other hand, various practical witnesses on the part of the plaintiff proved that a corn-mill was properly for the grinding both of the corn and the husk, and that the grinding of the pollard or corn husk was not more dangerous than that of rice chaff.

MARTIN, B., thought that the only plea which the defendants could possibly rely upon was the third.

Hawkins, as to that, contended that as it was not pretended that the plaintiff, the assured, had stated that rice chaff was to be ground, there had been an omission to communicate "a matter material to be made known to the company;" but

MARTIN, B., told the jury that this condition clearly meant something that was material to be known to the company and which was *not* known to them or to their officers. Here, however, the matter *was* known to them. The mill had been used for years for the grinding of rice chaff, and used publicly and openly, and the company's officer resident in the neighborhood well knew the mill. Did the plaintiff, then, "*omit* to communicate the matter which he might well presume they knew." It all turns on that, for there is no pretence for imputing misrepresentation, as the defendant made no representation at all. Was the matter, however, material to be known "to the company?" Unless it was material, there could be no defence on any ground.

Verdict for the plaintiff.

O. TALAMON & Co. vs. HOME AND CITIZENS' MUTUAL INSURANCE Co.

(Supreme Court, Louisiana, February, 1862.)

Loss or Damage by Fire. — What is.

When the policy compels the assured to labor for the protection of the goods, and they are injured or stolen in the attempt to avoid the fire, the insurer is liable.

APPEAL from the sixth district court of New Orleans.

BUCHANAN, J. Plaintiff insured against fire in two offices, five thousand dollars in each, a stock in trade of a country store. Before the expiration of the risk, a fire broke out in the immediate vicinity of the premises occupied by the assured. This was the same fire spoken of in our decision of the case of Cabellero and Basualdo, reported in 15th Annual, p. 217.

¹ 16 La. An. 426.

Loss or Damage by Fire. — What is.

Plaintiff has made a statement of the loss suffered by him, under the following heads: —

1. A portion of the stock of goods, amounting to \$8,000 was damaged by blood, mud, and water, to the amount of 30 per cent., say	\$2,400
2. Another portion, of the value of \$1,200, was damaged by the bursting of the roof, and the falling of bricks, timber, &c., to the extent of 30 per cent., say	360
3. The remainder of the stock, valued at \$10,800, damaged in consequence of the necessity of removal during a dark night, to the extent of 15 per cent., say . .	1,620
4. Expenses of removal	150
Total	\$4,530

The defence set up against this claim is, that the loss was not occasioned by a risk insured against.

From the evidence, it seems that no part of the stock in trade of plaintiff was actually consumed by fire; but that the damage was sustained partly in efforts to remove the goods from the premises of plaintiff to a place more remote from the seat of conflagration, with the intention of saving them from threatened destruction by fire; and partly, by the fall of buildings occasioned by an explosion of gunpowder.

The district judge was of opinion that inasmuch as by the conditions of the policy the assured was obliged to use his best endeavors for saving and preserving the property in the cases of fire, and of loss or damage by fire, and of exposure to loss or damage by fire, that he was entitled to recover for the third and fourth items of the above statement.

The plaintiff appeals, and urges that the first item of his statement of loss, is, equally with the third and fourth, referrible to the head of damage occasioned by a compliance with his obligation to use his best endeavors to preserve this property from the fire.

On the other hand, the counsel of defendants, who, by an answer to the appeal filed, ask for an amendment of their judgment in their favor, contend that the plaintiff has no claim to indemnity for damage and expenses incurred in removing the goods, because, in so doing, he was simply complying with a condition imposed in the interest of the underwriter, and diminishing his liability.

Upon this point of controversy, we quoted with approbation, in

Adjustment of Loss.

the *Case of Cabellero*, 13 An. 217, an authority from Bouvier, to the effect that "when the policy compels the assured to labor for the protection of the goods, and they are injured or stolen in the attempt to avoid the fire, the insurer is responsible." We have seen no good reason for changing our opinion upon this point. It remains to be seen whether the first item of plaintiff comes within this class of damage.

It is not expressed in the statement that the damage by mud, blood, and water was incurred in the attempt to remove the goods from plaintiff's store; but the evidence makes it very clear that, in point of fact, it was so incurred. Upon the principles of the decision in the court below, and of the doctrine heretofore recognized by us, the plaintiff is therefore entitled to have the first item of damage assessed in his favor. The policy makes plaintiff his own insurer to the extent of one fourth of the loss. The other three fourths of the first, third, and fourth items of loss must be borne by the defendants in equal proportions.

The second item is inadmissible under the decision in the case above quoted, of *Cabellero and Basualdo*. Upon this point the court was divided in that case, two judges dissenting, as shown by the report of the case. But the counsel of plaintiff relieves us of any difficulty in relation to it, by waiving in argument, before this court, this portion of his claim.

It is, therefore, adjudged and decreed that the judgment of district court be amended; and judgment is hereby rendered in favor of O. Talamon & Co., for the use and benefit of A. Sallé, against each of the defendants, severally, for the sum of fifteen hundred and sixty three dollars and seventy five cents, with legal interest from judicial demand; and against the said defendants, *in solido*, for the costs in both courts.

ANGELRODT & BARTH, respondents, vs. DELAWARE MUTUAL INSURANCE Co. appellants.¹ (Supreme Court, Missouri, March Term, 1862.) *Adjustment of Loss.*

The policy in suit (for \$5,000 on goods held on commission) contained the usual provision, that in case of other insurance the underwriter was to be liable for only its ratable proportion of the whole sum insured. The insured had another policy for \$4,000 on merchandise held on commission, and on merchandise on storage. A loss of over \$9,000 occurred, of which above \$7,000 was of goods on commission, and above \$1,000 of goods on storage. *Held*, that the value of merchandise on storage should be deducted from the

¹ 31 Mo. 593.

Repair. — Waiver.

sum insured by the second policy on goods on commission and storage, to determine the whole amount insured by the first policy, and that the defendants must pay the whole amount insured by them; since the loss exceeded the sum insured by both policies after the above named deduction was made.

JACOB BERSCHE *et al.*, respondents, *vs.* GLOBE MUTUAL INSURANCE Co., appellant.¹

(Supreme Court, Missouri, March Term, 1862.)

Repair. — Waiver.

Notice of intention to repair is a waiver of a defence of false representations, in the absence of fraud or mistake.

THE case is stated in the opinion.

BATES, J. delivered the opinion of the court.

This was an action on a policy of insurance against loss by fire, issued by the defendant to the plaintiff on their starch factory in St. Louis, which was destroyed by fire. It was provided in the policy that it was made and accepted in reference to the terms and conditions thereto annexed, which were to be used and resorted to, in order to explain the rights and obligations of the parties thereto in all cases not therein otherwise specially provided for. The second condition annexed to the policy was: "If any person, insuring any building or goods in this company, shall make any misrepresentation or concealment, or if after the expiration of a policy of insurance, and before the renewal thereof, the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect." It was also provided in the seventh condition annexed to the policy, that "In case of loss or damage under this policy, the insurers may, if they so elect, within twenty days after proof of loss, repair or rebuild the premises insured; and if they shall, in a reasonable time after notice of such election, restore to the insured the premises insured in as good condition as they were before the loss or damage, the insurer shall be discharged." It was claimed by the defendant that at the time that plaintiffs applied to the defendant for insurance they represented that a watchman was then kept on the premises, and that they would continue to keep one. At the trial it appeared that no watchman was kept, and

¹ 31 Mo. 546.

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there was conflicting testimony as to whether a representation had been made that a watchman would be kept. It also appeared that the defendant, after the fire, gave the plaintiffs notice that they would rebuild the premises. The court, on motion of the plaintiff, gave these instructions: —

1. It is no defence to a recovery in the suit that the plaintiffs, or any of them, either at the time of obtaining the policy sued on represented the value of the buildings on said premises greater than their real value, or after the loss represented the value of the property insured, or the extent and amount of the loss, greater than it really was, unless the same was done knowingly and wilfully by plaintiffs, and with a fraudulent design. 2. If the jury believe from the evidence that the defendant gave to plaintiffs the notice of their intention to rebuild the premises destroyed by fire, given in evidence by plaintiffs, and at the time of giving said notice the defendant knew that no watchman had been kept upon said premises from the time of the issuing of said policy to the time of the happening of the loss, then the jury may infer that the defendant waived their right to interpose that fact as a defence to the right of plaintiffs to recover under the policy, and the burden of proof is on the defendant to satisfy the jury that at the time of giving such notice the defendant was ignorant of that fact. 3. Even if the jury shall believe from the evidence that at the time the insurance was applied for by the plaintiffs, or their agent, of the defendant, the plaintiffs, or their agent, represented that a watchman was kept and would be kept upon said premises insured, and that no watchman was then or afterwards kept thereon, yet, unless the jury believe that the said representation was one of the causes why defendant took the risk, and without such watchman being then kept and continuing to be kept the said defendant would not have taken the risk or issued the policy, then the fact that no watchman was kept proves no defence to this action. 4. Although the jury may believe that at the time of making the application for the policy sued upon by plaintiffs, or their agents, it was represented by them, or their agents, that a watchman was and would be kept in charge of the premises insured, and that that matter was regarded by the agents of defendants as material to the risk — that is, without such representations the risk would not have been taken, or a higher rate of premium would have been charged therefor; and that the build-

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ing was damaged or lost by fire, and at the time there was no watchman in charge of the premises ; and that the defendant, by its authorized officers and agents, knew these facts, and with such knowledge the defendant alone, or in conjunction with other companies, agreed to make good the loss by rebuilding the premises, and notified plaintiffs thereof, and failed or refused to rebuild, and made no objection to making good the loss on the ground that no watchman was in charge of the premises at the time of the fire until after the institution of this suit : from these circumstances the jury are authorized to infer that defendant waived that matter, and in such case it constitutes no defence to this suit.

To the giving of which instructions the defendant by its counsel objected, and the objection being overruled, defendant at the time duly excepted, and the instructions were given.

The court also, on motion of defendant, gave this instruction : —

“ If the jury find from the evidence that the plaintiffs, in person, or by their agent, William Bersche, in that behalf, at the time of the application for insurance upon the premises in question, represented to the defendant, its officers, or agents, that the plaintiffs then had and would continue to keep a watchman upon the said premises, and that the said policy issued in this case to plaintiffs by defendant was issued upon the said representation, and that said representation had a material influence upon the minds of the agents of defendant in inducing them as such agents to take the said risk, and that the said risk would not have been taken by the defendant, its officers, or agents, if the said representation had not been made; then if the jury find that the plaintiffs did not keep a watchman upon the said premises at the time of and after the issuing of said policy, the jury will find for the defendant.”

The defendant asked these instructions, which the court refused to give.

1. If the offer of defendant to rebuild was made within twenty days after notice and proofs of loss were delivered by plaintiffs, then the plaintiffs cannot recover in this action. 2. If the offer of defendant to rebuild was not made within twenty days after notice and proofs of loss were delivered to defendant by the plaintiffs, but if the plaintiffs assented to said offer to rebuild, then the plaintiffs cannot recover. 3. If it does not appear from

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the evidence when the proofs of loss were delivered, then the jury are to find whether the defendant's offer to rebuild was accepted by the plaintiffs; and if the said offer to rebuild was not accepted, then the offer to rebuild is not a waiver of any defence in this action upon the question of representation; and if the said offer to rebuild was accepted by the plaintiffs, then the plaintiffs cannot recover in this action. 4. If the jury believe from the evidence that either of the plaintiffs, or William Bersche, as their agent, at the time of applying for the policy sued on, or at any time during the negotiations which resulted in the issuing of said policy, represented to the officers of the defendant that plaintiffs then kept and would continue to keep a watchman upon the insured premises; and if they further believe that defendant would not have granted said policy and taken said risk if such representation had not been made; and if they further believe that no watchman was kept upon said premises at the time said representation was made, nor at any time thereafter up to the time of the fire, and that the officers and agents of the defendant had no knowledge or information until after the fire that such watchman was not kept; then they are instructed that there was such misrepresentation on the part of the plaintiffs as to render said policy absolutely void, and no acts of the defendant, or its officers or agents, after the fire, given in evidence, could have the effect of giving said policy any force or validity, and the verdict should be for the defendant.

At the hearing in this court, the defendant (appellant) formally withdrew any objection to the first instruction given for the plaintiffs, and no question was made upon the first three of the instructions refused the defendant, and they appear to have been very properly refused.

The other instructions — that is, the last three given for the plaintiffs, the one given for the defendant, and the fourth refused the defendant — all refer to the representation alleged to have been made, and its materiality and the breach of it, and the alleged waiver of it by the election of the defendant to rebuild. Under the instructions given, if the jury had found that the alleged representation was made, and that it was so material that if it had not been made the risk would not have been taken, or a higher rate of premium would have been charged; and that no watchman was kept (of which there is no question), and that, at

the time of making the election to rebuild, the defendant had no knowledge of the fact that no watchman was kept, they must have found a verdict for the defendant. The jury, however, found a verdict for the plaintiff, and that verdict must have been based upon the ground, 1st, that the representation was not made; or, 2d, that it was not material; or, 3d, that the defendant, before making the election to rebuild, had knowledge that no watchman was kept. If based upon either of the two first mentioned grounds, no one would doubt the legal propriety of the verdict. The question then to be considered is whether, if the verdict was based upon the third ground, it was legal and proper. The plaintiffs insist that the defendant had a legal competency to waive their right (if any) to defend against the plaintiffs' claim by setting up their failure to comply with the representation, and that their election to rebuild and notice of it was such waiver. The defendant, on the other hand, contends that the policy was void *ab initio*, and could not be revived by an act which supposes a liability, and that the election and notice given of it were not efficient to revive it. The second condition annexed to the policy (under which these questions arise) includes not only misrepresentations and concealments, which may be supposed to precede the issuing of the policy, but also other matters which may follow the issuing of the policy, extending to all such occupation of the premises insured which may render the risk more hazardous, as matters which shall render the insurance, not the policy, void and of no effect.

Misrepresentation is therefore put by the contract upon the same footing with all other things which may happen to increase the risk, and the courts have frequently held that such defences may be waived. There is no reason why contracts of insurance, whether made by natural persons or artificial corporations, should be construed differently from other contracts. After the destruction by fire of the plaintiffs' factory, surely the defendant might have paid the amount of the insurance if it had chosen so to do; much more could it waive a single ground of defence to the plaintiffs' claim. The question recurs, did the election to rebuild and the notice of that election given the plaintiffs, operate as a waiver of the defence of misrepresentation? Bearing in mind that the jury (if the verdict is based upon a waiver at all) have found that the defendant had knowledge that no watchman was kept, it is

Notice of other Insurance.

clear that the defendant did not rely upon the misrepresentation as a defence to the plaintiffs' claim; and if it had announced to the plaintiffs that it would make good their loss by paying them the money, it would seem clear that all defences were thereby waived, no fraud or mistake being shown. The notice to the plaintiffs that the defendant would rebuild the premises is an announcement that it would make good their loss in another way than by the payment of money, the right to do which was reserved in the contract as a privilege to the defendant which the plaintiffs could not reject, and which needed no acceptance from them to render binding.

The instructions left it to the jury to infer from the evidence stated that a waiver was made; and if it has so inferred, no objection is perceived to the inference.

Judges BAY and DRYDEN concurring in this decision, the
Judgment is affirmed.

JACOB BERSCHE *et al.*, respondents, *vs.* ST. LOUIS MUTUAL FIRE AND MARINE INSURANCE Co., appellant.¹ (Supreme Court, Missouri, March Term, 1862.) *Incumbrances. — Waiver.*

A provision in a policy of insurance upon buildings, that it should be void unless the incumbrances be expressed therein, is satisfied if the application (which formed part of the policy) state that the property was incumbered, without stating the amount.

The notice given by the insurance company to the assured, after the fire, of its determination to rebuild the premises, was a waiver of the defence that the assured had not stated the amount of the incumbrances upon the property insured.

ANN MARIA WYMAN, adm'x, *vs.* DAVID B. PROSSER *et al.*²
(Supreme Court, New York, March, 1862.) *Administrator and Heir. — Title to Insurance.*

The proceeds of a policy payable to the assured, his executors, administrators, and assigns, belong on the death of the assured to the executor or administrator, and not to the heir. See *Milmay v. Folgham*, 3 Ves. 472.

GILBERT *vs.* PHOENIX INSURANCE Co.³ (Supreme Court, New York, March, 1862.) *Notice of other Insurance.*

The clause requiring notice of prior and subsequent insurance to be indorsed upon the policy or otherwise acknowledged in writing, *held*, valid. It is not enough in such case to verbally notify the defendants' agent of the other insurance; the same must be indorsed upon the policy, or otherwise mentioned in writing.

¹ 31 Mo. 555.² 36 Barb. 368.³ 36 Barb. 372.

Assessment. — Mortgage.

JOHN N. FRANCIS & others vs. BUTLER MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Rhode Island, March Term, 1862.)

Assessment. — Mortgage.

Where one article of the by-laws of a mutual fire insurance company provided, "If any assessment required by the directors is not paid within thirty days after notice, the delinquent's policy shall cease and determine," &c., and another by-law provided, amongst other things, "Any policy of insurance payable to the mortgagee in case of loss shall continue so payable notwithstanding any alienation of the property of the mortgagor, made subsequently to such insurance. And such mortgagee shall pay any and all assessments on the property, provided the original assured shall not pay the same on demand," it was *held*, that the forfeiture provided by the former section did not apply to the case of a mortgagee to whom, by the policy, the loss was made payable; and that he might, in case of loss, recover thereon, although the policy had ceased, by neglect to pay an assessment within the thirty days, as to the mortgagor, whose interest was insured.

ASSUMPSIT upon a policy of fire insurance, insuring one Michael Maginn, in the sum of \$450, upon his dwelling-house in North Providence, against loss or damage by fire, from the fourth day of December, 1857, to the fourth day of December, 1860; the loss payable to the plaintiffs, as trustees of the Mechanics' Mutual Loan Association, to whom the house was mortgaged, as stated in the application for insurance, in the sum of \$500. The defendants were a mutual office, and the policy was issued by them on the fourth day of December, 1857.

The case was submitted to the court, without a jury, at their March term for the county of Providence, 1862, under the general issue. At the trial it was agreed that the house insured was totally destroyed by fire on the ninth day of October, 1859, and was, at the time of the loss, of the value of \$600, and that the plaintiffs were entitled to recover the whole amount of the loss, if anything. The defence turned, solely, upon the thirteenth article of the by-laws of the company, — annexed to and made part of the policy, — and which was as follows: "13. No policy shall be valid until the premium is paid. If any assessment required by the directors is not paid within thirty days after notice, the delinquent's policy shall cease and determine; and in case of insurance of property not situated within this state, the president and directors may require, as a security for the capability of the assured for the assessments, a surety satisfactory to the directors. Notices of the sums required to be paid by the directors shall be

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given in such manner as the directors may prescribe ; and in case any person insured by this company shall neglect to make any payment as aforesaid, the lien mentioned in section seventh of the act of incorporation of this company may be enforced in the manner therein named."

The eleventh article of the by-laws contained, amongst other clauses, this : —

" Any policy of insurance payable to the mortgagee, in case of loss, shall continue so payable notwithstanding any alienation of the property of the mortgagor, made subsequently to such insurance. And such mortgagee shall pay any and all assessments on the property, provided the original assured shall not pay the same on demand."

Assessments having been made by the directors of the company in 1859, to cover losses of the company, notice of the same had been repeatedly given both to Maginn and the plaintiffs, in the mode prescribed by the directors, to call and pay them ; and more than thirty days had expired after such notices, before the happening of the loss, without payment of the assessments by either, as will be more particularly stated in the opinion of the court.

BRAYTON, J. This action is brought upon a fire policy, made by the defendants, December 4, 1857, whereby they insured one Michael Maginn, in the sum of \$450, against loss or damage by fire upon his dwelling-house, situate in North Providence. The policy was made payable, in case of loss, to the plaintiffs, who are mortgagees of the property insured.

At the trial it was agreed that the property had been totally destroyed by fire on the 9th day of October, 1859, and that the assured had furnished the usual and necessary preliminary proof required, and that the plaintiffs were entitled to recover, if the policy, at the time of the loss, were a subsisting one.

The defendants claimed, that by virtue of certain by-laws of the company, subject to the conditions and limitations on which the policy was made and accepted, and which were annexed to and made part of the contract of insurance, the policy had become void. Section 13 of the by-laws is that upon which the defence is made to rest. It is as follows : —

" 13. No policy shall be valid until the premium shall be paid. If any assessment required by the directors is not paid within thirty days after notice, the delinquent's policy shall cease and

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determine; and in case of insurance of property not situated within this state, the president and directors may require, as a security for the capability of the assured for the assessments, a surety satisfactory to the directors. Notices of the sums required to be paid by the directors shall be given in such a manner as the directors may prescribe; and in case any person insured by this company shall neglect to make any payment as aforesaid, the lien mentioned in section seventh of the act of incorporation of this company may be enforced in the manner therein named."

On the 8th day of March, 1859, the directors of the company, for the purpose of paying certain losses, amounting to the sum of \$6,542.88, ordered that the persons insured should pay in a contribution, proportioned to the amount by them insured, and to the amount of premium paid by them; that it should be paid between the 15th day of March and the 18th day of April following, and that notice of the order and of the amount of the contribution required should be given, by circulars, delivered to the persons of whom it was required.

Notice of the order of the directors, the amount required to be paid, and of the time within which payment was required to be made, was given, in the mode provided, both to the original assured and to the mortgagees, before the 15th day of March, 1859; and notice, at the same time, was given to both, that "By-law No. 13 provides, that if any assessment required by the directors is not paid within thirty days after notice, the delinquent's policy shall cease and determine, and that the lien upon the property, given by the act of incorporation, may be enforced." On the 16th of April following, notice was given to both, that "Your assessment, due April 15th, remains unpaid." On the 20th of June following, notice was again given to both, that "Your assessment, due April 15, remains unpaid," and that if not paid on or before July 1st, it will be collected in accordance with section seventh of the charter, reciting that section; and similar notices were given at other times.

From the evidence in this case it is quite clear that the assessment, ordered by the directors to be paid upon this policy, was not paid within thirty days after notice, nor within thirty days after the last day limited by the order for its payment. This neglect to contribute to the losses of the other members of the company, as thus required, would have operated to avoid the pol-

Assessment. — Mortgage.

icy as to the original assured, Michael Maginn, under the provisions of the thirteenth section of the by-laws; and since the loss, which by the terms of the policy is to be paid to the mortgagees, is the loss of the original assured, and not of the mortgagees, and he had no subsisting policy whereon a loss could happen, the mortgagees, if this were all, would be alike defeated of a recovery, in case of a destruction of the property by fire. *Horsie v. The Providence Mutual Fire Insurance Company*, 6 R. I. Rep. 517, *ante*. Unless, therefore, the persons to whom the loss is made payable have some right of recovery secured to them by other provisions of the policy, beyond that of the original assured, they must be barred by his default. That the policy contemplates some such right, distinct from that of the assured, is quite evident from the provision of the eleventh section of the by-laws: —

“11. When any property, insured by this company, shall be alienated by sale or otherwise, the policy shall thereupon be void; unless the new owner of the property shall have the policy assigned to him by an indorsement thereof, and shall, within ten days, obtain the consent of the directors thereto, and the said assignment from thenceforth shall give to the new owner all the benefit resulting from said policy. In case of alienation by devise, the policy shall be void, unless the devisee or executor shall, within thirty days after the probate of the will of the deviser, procure a renewal of the policy, or make an assignment thereof to the devisee, with the consent of the directors, of which he shall give notice; and property mortgaged shall not be considered alienated, except when it shall be taken possession of by the mortgagee, for the breach of the condition expressed in the mortgage deed, or in any defeasance; then the policy shall be void, unless the same be transferred to the mortgagee with the consent of the directors. Any policy of insurance payable to the mortgagee in case of loss shall continue so payable notwithstanding any alienation of the property of the mortgagor, made subsequently to such insurance. And such mortgagee shall pay any and all assessments on the property, provided the original assured shall not pay the same on demand.”

By this section, though the policy is to become void upon the alienation of the property, so that the original assured shall not recover in case of loss, it is, nevertheless, to continue payable to

Acts of Agent. — Mistake. — Equity.

the mortgagee in such case, in the same manner as if no alienation had been made. In case of non-payment of assessments by the insured, the person to whom the loss is made payable is holden to pay all assessments required of the assured, upon his default to pay upon demand. The payment here provided to be made by the mortgagee does not seem to be intended as a mere privilege in him to perform the obligation of the assured in order to avoid the forfeiture of the policy arising upon his default, but the mortgagee is made liable, absolutely, in such case, for all such assessments. It will be noticed, however, that the mortgagee is not required to pay within the time limited for the assured, nor is any time limited within which a mortgagee shall pay; nor is it provided that a failure by him to pay, upon demand, or that upon a failure for thirty days, or for any other period, to pay the assessment, the policy shall not still continue payable to him, as provided therein. The provisions of this section seem to contemplate that the policy shall continue in force for the benefit of the mortgagee, when it has been forfeited as to the original assured.

We are, therefore, of opinion, that the plaintiffs are not within the thirteenth section of the by-laws; and that, as to them, there was, at the time of the loss, a subsisting policy; and that they are entitled to be paid the amount of the loss, as the policy provides.

WOODBURY SAVINGS BANK AND BUILDING ASSOCIATION *vs.*
 CHARTER OAK FIRE AND MARINE INSURANCE Co.¹ (Supreme
 Court, Connecticut, April Term, 1863.) *Acts of Agent. — Mistake.*
— Equity.

It is the settled policy of our law to treat local agents of insurance companies, who are authorized to procure and forward applications for insurance, as the agents of the companies and not of the applicants, in any mistakes of the application made by them or by the applicant under their direction.

An agent, employed by such a local agent, in pursuance of a custom known to and approved by the company, to solicit and forward to him applications for insurance, *held* to stand in the same relation to the company as to such mistakes.

Where a mortgagee applied for insurance through such an agent, intending to procure an insurance of his mortgage interest and so stating to the agent, but the agent drew the application as for an insurance on the property itself, in the name of the mortgagor and as his property, the amount to be payable in case of loss to the mortgagee, and so made the application and had the policy so made in the belief that such was the proper legal mode of effecting an insurance on the mortgage interest, it was *held* that the mistake could be corrected by a court of chancery, although it was one of law and not of fact.

¹ 31 Conn. 517.

Pleading. — Notice of Loss.

Held, also, that the insured was not affected by the fact that the agent had been instructed by the company not to take applications for insurance upon mortgage interests, he having no knowledge of such a limitation of the powers of the agent.

A condition in a policy that no suit shall be brought in case of loss unless within six months after the loss, is valid and binding on the insured.

But where an action at law was brought on the policy within the time limited, which it was found could not be sustained by reason of a mistake in the form of the policy, and a bill in equity was brought while that suit was pending, and after the six months had expired, for the correction of the policy and for an injunction against the defence set up in the action at law, it was *held* that the suit was not barred by the expiration of the time limited.

Where a condition of the policy provided that it should become void if any further insurance was obtained on the property insured, without the consent of the insurance company indorsed on the policy, and the owner of the equity of redemption procured a later insurance of the property of which no notice was given to the company, and of which the party originally insured had no knowledge, it was *held*, that as the original insurance was intended as an insurance of the mortgage interest of the insured, and was to be regarded as equitably such, the later insurance was not a further insurance of the same property, and not a breach of the condition.

WILLIAM A. HERRON vs. PEORIA MARINE AND FIRE INSURANCE CO.¹

(Supreme Court, Illinois, April Term, 1862.)

Pleading. — Notice of Loss.

Covenant *held* proper in this case upon a renewal insurance.

The insured need not set out the application in declaring upon his policy.

Personal notice of loss is not necessary.

If the certificate of loss is received without objection, this is a waiver of the question of nearness.

THE case is sufficiently stated in the opinion.

BREESE, J. As we understand the record in this case, the only important question presented is the sufficiency of the second count of the declaration as amended, to which a demurrer was sustained in the court below.

The action was covenant on a policy of insurance, bearing date the first day of September, 1855, and sealed with the seal of the Peoria Marine and Fire Insurance Company, the defendant.

Condition thirteen, of the policy, is in these words: "Insurance once made may be continued for such further term as may be agreed on, the premium being paid, and a renewal receipt given for the same; and it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been

¹ 28 Ill. 235.

changed, either within itself or by the surrounding or adjacent buildings.

The amended second count, after setting out the conditions attached to the policy, one of which is copied above, alleges that defendants made their certain policy of insurance for the period of one year, subject to certain conditions thereunto attached ; one of which conditions provided that insurance once effected might be continued for such time as might be agreed on, the premium being paid by the insured and a renewal receipt being given therefor ; that in pursuance of such condition the policy sued on was, by the payment of the premium, and the granting of the renewal receipt, continued in force until the time of the destruction of the insured premises by fire ; that the plaintiff was interested in the premises when burned ; that the fire did not happen in such a way as to bring it within any of the exceptions of the policy, all of which are specifically enumerated ; that plaintiff has complied with each and all of the conditions precedent, which are specifically set forth, and that the defendants have failed to perform their covenants.

The point is, will covenant lie on the case presented by this count ?

The defendant contends, that as the renewal receipts show new and distinct agreements, enlarging risk and extending the time, and are not under seal, assumpsit, and not covenant, is the proper action.

We do not perceive in the pleadings any averment of any fact from which it could be inferred there had been an increase of risk, or any change in the terms of the original policy, by any subsequent parol agreement or contract. It attempts, and we think successfully, to avail of condition thirteen, by averring payment of the premium and the execution by the company, of a renewal receipt for the same, which, by force of the condition, continues the original policy.

It is not like the case of *Luciani v. The Am. Fire Ins. Co.* 2 Wharton, 172. The policy in that case contained no such provision as this. In that case parol agreements had been indorsed on the original policy, variant from the policy, and the policy contained no covenant that it should be continued by such agreements. It seems to indicate, most clearly, that a new policy was to be executed upon the payment of the current premiums, since

there is a stipulation that there shall be no charge for such new policy.

This policy continues itself by its own terms, on the performance of the condition precedent, to wit, the payment of the premiums, and taking a receipt therefor. This is the mode agreed upon by the parties for continuing the policy, and not by executing a new one. We think this is very clear, and the company should not be allowed to repudiate their agreement. They have received the premiums and given the renewal receipts, the effect of which, as they well understood, was to continue the original policy. These receipts are no new contracts, but merely evidence that the condition of the policy has been complied with by the assured.

The objection that the original application for insurance, being a condition precedent, is not set out, we think is not sound. We do not think the assured is bound to set out and prove the truth of his representations. They are subject to attack by the defendant, and if he shows their falsity, if material, the assured cannot recover.

As to the objection that notice was not given to the secretary of the company of the loss, it is sufficient if it was given and received at the office of the company.

As to the last objection, of the want of an averment that Bailey, whose certificate formed a part of the preliminary proof required by the terms of the policy, was the notary nearest to the place of the fire, it is sufficient to say that the certificate was received, for aught that appears, by the insurance company, without any objection. As we said in the case of the *Great Western Insurance Co. v. Staaden*, 26 Ill. 865, good faith and the principle of fair dealing required that the company, if intending to insist upon this formal defect in the proof, should in a reasonable time have notified the assured, so that the defect might have been remedied. We must hold that this defect was waived by the company.

The judgment is reversed, and the cause remanded, with leave to the defendant to plead to issue.

Judgment reversed.

Alienation.

WESTERN MASSACHUSETTS INSURANCE CO. vs. GEORGE S. RICKER & another.¹

(Supreme Court, Michigan, April Term, 1862.)

Alienation.

A policy of insurance, one of the conditions of which is that "in case of any sale, transfer, or change of title in the property insured, such insurance shall be void and cease," is avoided by a conveyance which is absolute in form, though given as security for a debt merely.

And where the insurance is upon a single building, and the conveyance is of an undivided interest only, the conveyance avoids the whole policy, notwithstanding the interest of the insured remaining unconveyed is shown to exceed in value the sum insured.

ERROR to Genesee Circuit. The case, so far as passed upon, will be found stated in the opinion.

MANNING, J. One of the conditions attached to the policy of insurance, and forming a part of it, is in these words: "And in case of any sale, transfer, or change of title in the property insured by this company, such insurance shall be void and cease." The property insured was a three story frame flouring and grist-mill, belonging to the insured. After the insurance and before the fire, the insured conveyed an undivided one third interest in the premises on which the mill stood to Latourette. The conveyance was in the usual form, but was intended by the parties to it as security to Latourette for a debt the insured were owing him, and to secure further advances to be made to them by Latourette, who, after the fire, on being paid what was due him, reconveyed the premises to the insured.

The insurance company insist that the conveyance to Latourette annulled the insurance, under the condition of the policy above stated. The company also insist that the court erred in admitting parol evidence to show the conveyance to Latourette was intended as security only for what the insured were owing him, and for further advances. While, on the other hand, the insured insist they had a right to introduce on the trial parol evidence for that purpose; and that if the court erred in admitting it, they are still entitled to recover the whole amount insured, which is \$2,000, as the mill, which was wholly destroyed by fire, was shown on the trial to have been worth \$6,000 at the time of the fire; or if they are not entitled to the \$2,000, that they are entitled to two thirds of the insurance, as they had only conveyed to Latourette one third of the mill.

¹ 10 Mich. 279.

Alienation.

The words *transfer or exchange of title* are more comprehensive than the word *sale*, which immediately precedes them. A sale is a parting with one's interest in a thing for a valuable consideration. This is what is generally understood by the word, and in every sale there is a transfer or change of title from the vendor to the vendee. But there may be a transfer or change of title without a sale. Should A convey a piece of property to B to hold in secret trust for him, there would be a transfer or change of title from A to B, but there would not be a sale of the property, or an actual parting with it to B for a valuable consideration, although the conveyance on its face would import a sale of it by A to B. And if the trust instead of being secret appeared on the face of the conveyance, there would still be a change of the title. The title would no longer be in A, but in B his grantee. We think such a conveyance would clearly come within the condition of the policy, and put an end to the insurance. And if such a conveyance would annul the policy, we see no reason why the conveyance to Latourette should not have that effect. The title to one third of the mill was in him, and not in the insured, when the fire occurred. There can be no doubt that the deed, being absolute on its face, and not in form a mortgage, placed the title in Latourette. He could have sold the property and conveyed a good title to his vendee, if the latter was ignorant of the circumstances under which he had acquired the title. It is immaterial, therefore, for the purposes of the present suit, whether the insured could or could not at law show by parol evidence that the conveyance was intended as security merely, as such evidence would not show the title had not been in Latourette, but that he had done no more than his duty in reconveying the property on being paid what was due him.

But it is insisted the conveyance does not affect the insurance on the other two thirds of the mill. If the insurance was of two separate buildings or piece of property, and one had only been conveyed, we are inclined to think it would not affect the policy as to the other. *Clark v. New England Mutual Insurance Co.* 6 Cush. 342.¹ The mill was as entirety, and insured as such. The title was changed; not the whole title, but a part of it. The whole title was in the insured at the date of the policy; when the fire took place two thirds of the title only was in them, and one third in Latourette. This is a change of title to the entirety

¹ *Ante*, vol. 3, p. 131.

Other Insurance. — Construction.

of the thing insured. See *Dreher v. Aetna Insurance Co.* 18 Mo. 128, *ante*; *Dix v. Mercantile Insurance Co.* 22 Ill. 272, *ante*.

For these reasons we are of opinion the court below erred, and that the judgment should be reversed, with costs.

MARTIN, C. J., and CAMPBELL, J., concurred. CHRISTIANOY, J., was absent when the case was decided.

COMMONWEALTH INSURANCE CO. *vs.* MONNINGER.¹ (Supreme Court, Indiana, May Term, 1862.) *Representations. — Warranties. — Evidence.*

The mere indication in the policy of the place where the application could be found on file does not make the latter a part of the contract, so as to render its instruments warranties.

If the facts as disclosed in the evidence showed, as indicated by the findings of the jury, that certain untrue statements (not made warranties) by the plaintiff did not induce the defendant to take the risk, and the defendant was not deceived as to the same, they were not material in determining the question whether the risk should be taken or the estimate in reference thereto.

During the progress of the trial plaintiff was permitted to prove that he had transmitted by mail to the secretary of the defendants a notice of the loss, and to read to the jury a copy of that notice which he had retained; without having notified the defendant to produce said notice on the trial. *Held*, proper.

VOSE *et al.* *vs.* HAMILTON MUTUAL FIRE INSURANCE CO.²
(Supreme Court, New York, May, 1862.)

Other Insurance. — Construction.

The policy declared that "in case any other insurance has been or shall be issued covering the whole or any portion of the property insured," the contract should be void without notice and consent. The insured removed the goods (ready-made clothing) covered by the policy in suit into another building containing other goods of the same kind, upon which he had obtained other insurance; the two lots of goods being consolidated after the removal. *Held*, that it was not necessary to give notice of this insurance. HOGBROOM, J. dissenting.

THE case is sufficiently stated *supra*.

PECKHAM, J. It appeared on the trial that the goods in store No. 148, after removal, were one consolidated stock, not kept separate, but replenished from time to time up to the fire. The question is did these facts constitute a violation of that provision of the policy forbidding double insurance except by consent.

That there was a double insurance in fact and in law is clear, from the time the goods in No. 146 were removed to No. 148. The two policies then attached to the consolidated stock and also

¹ 18 Ind. 352.² 39 Barb. 302.

to all goods purchased from time to time to replenish it. 1 Phil. on Ins. 5, 491; Angell on Ins. § 203; *Hooper v. Hudson R. Fire Ins. Co.* 17 N. Y. 426.¹ The plaintiff was aware of the effect of this consolidation of the stock as to the insurance, as he procured the consent of the other company for the additional insurance by the defendant of \$2,500. This additional insurance was made or effected solely by this removal of the goods from No. 146 to 148.

The eighteenth article of the defendant's by-laws provides in terms against any policy "that has been or shall be issued." It will, perhaps, be better understood if each part be considered separately. Has that part of the article referring to a policy that "has been issued" been violated? If that part stood alone it would read, "In case any other policy has been issued covering the whole or any portion of the property insured," this policy shall be void, unless, &c. That provision, thus stated, would plainly refer to a policy that had already issued and that then covered this property. It had no reference to any policy already issued that did not cover this property. With such a policy the defendant could have no concern. There was in fact, then, no policy issued at the time the defendant issued its policy, "covering" or touching the property then insured by the defendant. The property afterward became covered by the policy of the other company, by its subsequent removal to No. 148. The same may be said of the property in No. 148, prior to the removal of the goods from 146. They were not insured by the defendant's policy, prior to the removal. The removal extended the defendant's policy. That removal was not a reissuing of either policy.

This act of removal, as matter of law, without any new agreement or new policy, made the property covered by the other policy.

As to the other provision of the article, having reference to the future, it is not pretended that any policy has in fact been issued since the issuing of the defendant's policy covering the property insured by the defendant.

This is a close case, and is disposed of upon the peculiar and precise phraseology of the defendant's by-law. The defendant has been careful to frame some thirty by-laws, modifying and qualifying its liability; providing specially when the policy shall be void. The language of this by-law does not cover this case

¹ *Ante*, p 266.

of insurance by this transfer of the property. No fraud is imputed to the insured in the transaction, and I do not think the defendant is at liberty to insist that the insurance is forfeited by an act that is excluded as a ground of forfeiture by the terms of the article on that subject.

I confess I have not arrived at this result, in this case, without considerable hesitation, in view of the temptations to fraud held out by additional insurances, and of the necessity of their being known to insurance companies. But a forfeiture of the insurance should not be enforced against the language of the provision itself.

The judgment should be affirmed.

MILLER, J., concurred.

HOGEBROOM, J. (dissenting). I am of opinion that upon the true construction to be given to article 18 of the by-laws of the defendant, attached to the plaintiff's policy of insurance, the plaintiff is not entitled to recover.

1. The plain object and intent of that article was to protect the company against double insurance without its consent; because in the event of such insurance there might be a strong temptation to fraud in the policy holder. The article was obviously designed to cover all possible cases of double insurance, and with this manifest intent of the parties before our eyes, I think we ought to give such a construction to the contract as will effectuate that intent, if we can do so without doing violence to the language employed.

2. And I think this can be done. The words are, "In case any other policy of insurance has been or shall be issued covering the whole or any part of the property insured by this company," the policy shall be void. Now while it is true that at the time the defendant's policy was issued, no other policy had been issued then covering the property insured by the defendant, it is equally true that a policy had been issued which, without alteration of its terms, thereafter covered the property insured by the defendant. In other words, certain property previously insured in a Troy company became, by removal into the store mentioned in the defendant's policy, covered by the defendant's policy. I think the clause in question, without any violence to its language or obvious intent, can and should be read as if it had been written, "In case any other policy of insurance has

Other Insurance.

been issued now or hereafter covering the whole or any part of the property insured by this company."

3. Again, take the other alternative: "In case any other policy of insurance shall be issued covering the whole or any part of the property insured," &c. Was not the Troy policy, so far as the property insured by the defendant was concerned, though dated before the defendant's policy, in effect issued afterwards; that is, did it not take effect afterwards upon the property insured by the defendant? Too narrow a construction should not be given to the word *issued*. As used in this clause it is synonymous with "take effect," or "become operative;" and if this meaning be applied to it, it plainly covers the present case.

4. In a subsequent part of the same article, it is provided that "in case of loss or damage of property upon which such double insurance subsists," the defendant's company shall, in the event of consent being given to the additional policy, not be liable for more than its proportional part of the loss. Now here plainly a double insurance subsists at the same moment, and this was the very contingency designed to be provided for by this article.

5. In considering this question I have of course assumed, as did the referee and counsel on both sides, that by the removal of the goods all the property was protected by both policies, if valid. *Hooper v. Hudson River Fire Insurance Co.* 17 N. Y. 426. At all events the new goods were, and no discrimination has been made between them, in the referee's report. Hence whether or not a portion of the goods only was covered by double insurance, a new trial is, if I am right, essential to adjust accurately the rights of the parties.

I am of opinion that the judgment entered upon the report of the referee should be reversed, and a new trial granted, with costs to abide the event.

Judgment affirmed.

DAVID vs. HARTFORD INSURANCE CO.¹

(Supreme Court, Iowa, June Term, 1862.)

Other Insurance.

The mere fact that a party has failed to disclose the true nature of his interest in property insured by him by a policy which requires such disclosure cannot, in an action upon another policy, be held to make the former void within a condition in the latter requiring notice of other insurance.

¹ 13 Iowa, 69.

THE case is stated in the opinion.

BALDWIN, C. J. The policy upon which the plaintiff seeks to recover was issued upon the 12th day of May, 1857, and insured the assignor of plaintiff, for one year, in the sum of \$4,000 upon a five-story brick block used as a hotel, and situated in the city of Dubuque. The policy was assigned to plaintiff upon the 20th day of October, 1857, at which time the plaintiff purchased the property insured — valued at \$103,000. The building was destroyed by fire on the 22d day of January, 1858. A condition was inserted in the policy which reads as follows: "That if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." It is claimed by the defendants that they are not liable upon their contract of insurance, as the plaintiff violated this condition of the policy. It appears from the evidence that the plaintiff, upon the 6th day of November, 1857, obtained policies of insurance upon said property, in the Charter Oak Insurance Company, in the sum of \$5,000; in the Phoenix, of Brooklyn, in the sum of \$2,500; and in the Massasoit, in the sum of \$2,500; and of which the defendants were not notified. It is claimed by the plaintiff, that these subsequent contracts of insurance were void, for the reason that there was a condition annexed to each of said policies, which required that where the interest of the assured was a leasehold interest it should be so expressed in the policy, otherwise the insurance should be void; that the interest of the plaintiff was a leasehold interest; that it was not so stated in the said policies; that each was therefore void, and being void, the plaintiff was not required to give any notice of their insurance to defendant. Under this issue, upon a trial, there was a judgment for plaintiff, and the defendant appeals.

The errors assigned are based upon instructions given by the court on its own motion, and the refusal to give those asked by defendant.

The first instruction given by the court, is as follows: "If you find that there was no notice to the defendant of the subsequent insurances, you will then come to the question whether the last policies of insurance were void, for if they were, the plaintiff

is entitled to recover, and in this it matters not whether notice was given or not."

In directing the jury in reference to the subsequent policies, the court said: "A stipulation or agreement in the policy is a warranty, and every warranty must be strictly complied with. A warranty is equally effectual if written upon a separate paper but referred to in the policy itself as a warranty, and the direct asseveration of a fact may constitute a warranty."

The court further instructed the jury, "that a second policy which is void does not vacate the first; and the fact that the company who issued the second policy paid the amount insured is of no consequence in the question here involved, if the payments were made upon a policy clearly void."

Several instructions were asked by the defendant and refused by the court. Among others the following: "The said several insurance companies had a right to waive the failure of David to state his interest in the property insured; and if they did waive it, the said contracts of insurance were valid."

"The plaintiff having received the amount of said policies, cannot, in this action, deny their validity."

"If the jury believe from the evidence that the plaintiff has attempted to procure and has procured subsequent insurances on said property, and has received payment for his loss by virtue thereof, as appears from said policies in evidence, then he has forfeited his contract with defendant, and the jury must so find for the defendant."

"These were voidable, and not void, and the said insurance companies could affirm them and waive all objection, and having paid the insurance in full, and the same having been accepted by the plaintiff, he cannot now avoid it, unless he alleges and proves fraud or mistake in the transaction, to his injury or prejudice."

The subsequent policies, or copies thereof, do not appear in the record. The agent of several companies who issued the same testified that each policy contained the following, as one of the conditions of the insurance: "If the interest in the property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company, and expressed in the policy, otherwise the insurance shall be void."

The record shows that "it was not proved nor was it claimed that the interest of the assured was expressed in either of said

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policies of insurance." The testimony of the agent shows, however, that the assured represented himself as the owner of said property. The plaintiff, upon the trial, introduced evidence tending to prove the interest of the insured but a leasehold interest, and not absolute, as represented in the subsequent policies. It appears from this evidence that the plaintiff had a lease upon the lot upon which the building insured was located; that the lease was to continue for twenty years, and at the expiration thereof, in addition to the annual rent reserved, the lessee was to leave a two-story brick building remaining on said premises. The building insured was built and owned by the plaintiff, at the time of the issuance of the policy by the defendant.

It is true the interest of the plaintiff in the lot was but a leasehold right, but we are not prepared to say that the building insured was not absolutely the property of the plaintiff. The lessee was not required by the terms of the lease to leave such a building as the one insured upon the lot at the expiration of the lease. Was it not, therefore, until the expiration of the twenty years, fully and unconditionally the property of the insured? If the plaintiff, therefore, did not misrepresent his true interest in the property insured when he stated it was absolute, there was no violation of the conditions of the policies, and they were not void.

We do not, however, place our conclusions as to the rights of the parties upon this position alone. The jury, however, must have determined that the true interest of the plaintiff was but a leasehold interest, and that the plaintiff, having failed to have this interest truly stated in the policies, could not recover, and placed their verdict upon the ground that each of said policies was absolutely void.

Upon the supposition that the interest of the assured was but a leasehold interest, were these policies void? It must be conceded that upon their face they were each valid subsisting contracts. They were applied for by the plaintiff, and issued by the underwriters in good faith, and with the full understanding that if there should be a loss by fire, the insured was entitled to recover. How, then, could these policies be declared void? We can conceive of no manner in which they could be so held, except by the introduction of extrinsic facts, such as would render it evident that the plaintiff had wilfully and fraudulently concealed his true interest in the building insured, and had done this in violation

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of the terms of the several policies. This could be done only at the instance of the underwriters, in a suit upon the policies, as the conditions inserted are for their benefit, and not that of the assured. Suppose that the underwriters had refused, after the fire, to pay, and the plaintiff had brought his action to compel them to do so; and suppose, further, that the defendants had set up as a defence the fact that plaintiff had failed to have it stated in the policies that his interest was a leasehold interest, and it should be made to appear that his interest was not absolute, as represented in the policy, — would this defence, if established, bar the plaintiff from a recovery? The plaintiff could have suggested many considerations in reply to this defence. Suppose, for instance, that it could be shown that it was the fault of the underwriters, and not that of the plaintiff, that this interest was not truly stated? Suppose that the insurance had been effected without asking the plaintiff to state what his true interest was? Or, suppose that the underwriters had waived this misrepresentation of the true interest of the assured, and after the policies had issued, agreed to pay in case of a fire? If either of these facts had been established, the plaintiff could have recovered. If so, the policies were not void. We also think that the fact that these several policies were regarded as binding by the insurers, and the losses of plaintiff paid, is a strong presumption, at least, that the policies were not void.

We, therefore, conclude that these policies were not void. It is true, they might have been avoided by insurers, but so far as the plaintiff was concerned, they were valid, and were so treated by both parties. The plaintiff effected an insurance, therefore, that proved to be an availing one, and in doing so, without notice to defendants, he violated his contract with them to such an extent as to forfeit his right to recover.

The condition is inserted in defendants' policy, to protect the company from an over-insurance, without their knowledge. Where property is insured to such an extent that it would be to the interest of the insured that a fire should occur, the hazard is increased and the underwriters should know it. And even if the policies could have been avoided by the underwriters, it was the duty of the plaintiff to notify the defendants of his having effected what he supposed at the time to be a valid insurance.

We readily concede that the authorities are somewhat con-

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flicting upon this question, but we believe the cases referred to as favoring the position we have assumed are placed upon the better reasoning and the true principles of law.

The case of *Clark v. New England Mutual Fire Insurance Co.* 6 Cush. 342,¹ cited by counsel for appellee, is entitled to great consideration, as being the one most similar in its character to the one now before us, made by an able bench, and in which the leading case in support of the opposite position, *Carpenter v. Providence Washington Insurance Co.* 16 Peters, 495,² is reviewed, and the reasoning of Justice Story is endeavored to be refuted. The defendants in this case, *Clark v. The New England Co.*, had a condition in their policy similar to that of defendants. The plaintiff, Clark, subsequent to the date of his policy, effected an insurance in the Bowditch Company upon the same premises, and without notice to defendants. After making the policy declared on, Clark mortgaged the premises to secure the payment of \$400; and while the estate was thus incumbered, in the plaintiff's application to the Bowditch Company for an insurance, in answer to this interrogatory, "State whether or not incumbered, and to what amount," replied in writing, "None." Upon this application, containing this inquiry and answer, the policy of the Bowditch Company was issued.

The court in their opinion, say: "But the question is, was any other insurance obtained, within the just and true import of the section of the act before recited? The policy was issued by the Bowditch Company upon an application by the plaintiff, in which it was distinctly and expressly stated that there was no incumbrance upon the premises insured, when, in fact, there was a mortgage thereon for about \$400. The existence of this mortgage was certainly a material and important fact, not only in regard to the lien of the insurers upon the property, but also as to the ability and responsibility of the insured as to his interest and estate in the premises, and in other respects. But when the insurers desire a fact material, and make an express and direct inquiry as to that fact, it is material that the insured should answer that fact correctly. It is perfectly clear, therefore, that the Bowditch policy was issued upon a material misrepresentation of the insured in his application, and that the plaintiff could maintain no action upon it against that company. *It is an invalid and useless policy.* The defendants now say that their

¹ *Ante*, vol. 3, p. 131.

² *Ante*, vol. 2, p. 448.

policy is void, because the plaintiff obtained other insurance without giving them notice. But it does not appear, in point of fact, that the plaintiff did obtain other insurance. The plaintiff, it is true, had obtained a policy, but it was not binding in law, and could not be enforced. It was not an insurance, as manifestly understood by the defendants themselves, when they made their policy."

Let us see how far this case is analogous to the one before us. The Bowditch Company was a mutual insurance company, we suppose, as the court speaks of the existence of the mortgage as a material fact, not only in regard to the lien of the *insurers upon the property*, but of the responsibility of the assured. It was more important to the validity and to the interest of the company that the true interest of the plaintiff assured should be disclosed. The assured was directly asked to state the incumbrances, and he replied that there were none. This statement is made a part of the policy. A fraud was, therefore, perpetrated in obtaining the policy. The Bowditch Company never waived this objection to the assured's right of recovery, and did not pay any loss to the plaintiff in that case. There was no double insurance obtained in that case, and the defendants could not claim that they were liable to pay only ratably.

Was the plaintiff in this case asked to disclose the interest he had in the property insured? Did he obtain the insurances upon any false representations? Was it not an available insurance to him? Did it prove to be really and in fact no insurance? Were not his subsequent policies binding, and could they not be enforced? The answers to these inquiries are disclosed by the record, and show the distinction between the two cases. The case of *Jackson v. The Massachusetts Mutual Fire Insurance Co.* 23 Pick. 418; ¹ and *Stacy v. Franklin Insurance Co.* 2 W. & S. 506, ² are cited by the court in their opinion in the above case as authority for its conclusions, and each is relied upon by the counsel for the appellee in their argument. None of the cases referred to that we have been able to examine support the ruling of the court more strongly than the case from 6 Cushing.

The case of *Carpenter v. Providence Washington Insurance Co.* 16 Peters, 496, and *Bigler v. New York Central Insurance Co.* New York Court of Appeals, *ante*, are each cited by counsel for defendants in this case.

¹ *Ante*, vol. 1, p. 764.

² *Ante*, vol. 2, p. 108.

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In the case of Carpenter, *supra*, Story, J., in delivering the opinion of the court says: "The second instruction asked proceeds upon the ground that although the policy of the 'American Insurance Company' was good upon its face, yet if, in point of fact, it was procured by material misrepresentation by the owners of the cost and value of the premises insured, it was to be deemed utterly null and void; and therefore as a null and void policy, notice therefore need not have been given to the Washington Insurance Company at the time of the underwriting the policy declared on. The court refused to give the instruction, and, on the contrary, instructed the jury, that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance Office was made, treated by all the parties thereto as a subsisting and valid policy, and had never in fact been avoided, but was still held by the assured as valid, then that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void. We are of the opinion that the instruction asked was properly refused, and that given was correct. It is not true that because a policy is procured by misrepresentation of material facts, it is therefore to be treated in the sense of the law as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters upon the proof of the facts; but until so avoided, it must be treated, for all practical purposes, as a subsisting policy. . . . But the question is not how the policy may now be treated by the parties, but how it was treated by them at the time when the policy declared was made. It was then a subsisting policy, treated by all the parties as valid, and supposed by the underwriters to be so. . . . And it may be well doubted whether a party to a policy can be allowed to set up his own misrepresentations to avoid the obligations deducible from his own contract. Be this as it may, it is in our judgment free from all reasonable doubt, that notice of a voidable policy must be given to the underwriters, for such a case falls within the meaning of the stipulations in the policy. It is a prior policy, and has a legal existence until avoided. Indeed, we are not prepared to say that the court might not have gone further, and have held that a policy existing and in the hands of the insured, and not utterly void upon its face, without any reference whatever to extrinsic facts, should have been notified to the underwriters, even

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though by proofs afforded by such extrinsic facts it might be held in its very origin and concoction a nullity."

This policy of the existence of which the court thus held that notice should have been given to the underwriters, was obtained through false representations, and was held to be utterly void. 1 Story, 57.

In the present case there is nothing to show that the policies were void on their face, and the extrinsic evidence fails to show that they were obtained by any false representations, or that the underwriters had ever taken any steps to avoid them. They were treated by the parties when made as valid subsisting policies, and then and afterwards treated by the underwriters as such.

The case of *Bigler v. The New York Central Insurance Co.*, *supra*, is of recent authority, and the facts stated show the case to be very much like the one now before us. The plaintiff in that case having been insured in the New York Central Company, the policy containing the same conditions as in that of defendants in this case, subsequently effected an insurance in the Globe Insurance Company upon the same property, in which there was a condition that if the insured had already any other insurance not notified to the said Globe Company, and indorsed upon their policy, it was to be void. The court in their opinion, by Davies, J., say: "The plaintiffs, to enable them to maintain their action against these defendants, now take the ground, that in fraud of this agreement with the Globe Company they concealed from them the fact of the prior insurance with defendants, and that such concealment rendered the Globe policy void. They say, therefore, they had no further or other insurance on the same property, and had not violated their agreement in that regard with these defendants. In assuming this position, they overlook the fact that this agreement or stipulation was made for the benefit of the Globe Company, and that it was competent for that company to waive it. It would appear that in the suit brought by these plaintiffs against that company, its liability on the policy was acknowledged, and a draft given to pay the amount of the loss. Both parties to the policy therefore treated it as a valid, subsisting instrument, and it will not answer for these plaintiffs now to shift their ground, and set up that this policy is void, and was so from the time it was issued, by reason of their fraudulent concealment of the fact of their prior insurance. But the agreement between

the parties to this action was, that the policy of defendants was to cease and be of no further effect if the plaintiffs thereafter should make any *other insurance* upon the same property, &c. It was the act of making another insurance which was to vitiate and render null the defendant's policy. We think it no answer for plaintiffs to make to allege that the other insurance might legally have been resisted and avoided. This was not what the parties had agreed to. . . . We are not at liberty to make a new contract for the parties, but to inquire whether the one that was made has been violated."

The court in this case refer to and adopt the views of Story, Justice, in the case of *Carpenter v. Washington Insurance Co.*, and review some of the cases cited in support of the position of appellee. In referring to the case of *Philbrook v. The New England Mutual Fire Insurance Co.*, cited by the counsel for appellee, Justice Davies says: "In that case the underwriters of the second policy paid the amount of the loss, thus directly affirming the policy, and admitting their liability on it. Yet the court say, the fact that the company who issued the second policy paid the amount insured is of no consequence in the question here involved, if the payment was made on a policy clearly void. Whether or not the policy was void, depended on the action of the underwriters. It was competent for them to waive, at any time, the forfeiture incurred by reason of the omission to give notice of a prior insurance, or of any fraud or misrepresentation existing at the time of the issuing of the policy. This waiver could as well be made after loss as before, and payment of the loss is the best evidence that the underwriters of the second policy did in fact make the waiver. It was therefore a case where both parties treated the policy as valid and subsisting; the insured, by making the claim for the loss under the policy, and the underwriters by admitting their liability and making payment. That policy was treated by the parties as a valid and legal policy, and effectual and binding upon the assurers. It came, therefore, directly within the class of policies referred to by the supreme court of Massachusetts in the case in 23 Pick., and was in this view a second insurance. We adopt the language of the court in that case, and agree with them that such second insurance would annul the previous policy."

The case of *Jacobs v. The Equitable Insurance Co.* (see 19th

Assessment. — Waiver. — Knowledge of Officer.

Upper Canada Reports),¹ is an analogous case, and strongly supports the view we have taken of this question.

It is claimed by counsel for appellee that the ruling of this court in the case of *Hygum v. The Aetna Insurance Co.* 11 Iowa, 21, *ante*, is favorable to the ruling of the court below. We do not regard our conclusions in this case as in conflict with that decision. The Dubuque Company, in that case, denied the validity of their policy, and did not waive the violation of its conditions. This alone, if in no other respect, shows that the cases are dissimilar.

The instructions asked by counsel for defendants, so far as they are consistent with this opinion, should have been given. The court erred in its instruction to the jury. *Reversed.*

KEENAN vs. DUBUQUE MUTUAL FIRE INSURANCE CO.²

(Supreme Court, Iowa, June Term, 1862.)

Assessment. — Waiver. — Knowledge of Officer.

Assessment and collection of a sum upon a premium note, after knowledge of a violation of the contract, is a waiver thereof.

The company are not bound by knowledge of one of its officers acquired in his individual capacity merely.

BALDWIN, C. J. . . . The controlling question in the case is, whether the defendant ever had notice of the violation of the terms of the policy prior to the fire, or when the assessments were made, by which it is claimed the forfeiture was waived.

The jury must have found that the defendant waived the forfeiture, as we think it is clearly established by the evidence that the introduction of "stage scenery" into said building was in violation of the conditions of the policy. Nor do we see how the jury could have found otherwise than they did, under the instructions of the court. The evidence shows that the president of the insurance company was present in the building when stage scenery was there used; that the opening of the theatre was announced by the public papers, and large notices posted up at the post-office, and at the public places in the city; that at a meeting of the directors of the Odd Fellows Hall Association, part of whom were directors and members of the insurance company, the question was canvassed whether a lease to the Dramatic Association, and, as incident thereto, the introduction of "stage scenery," would be in violation of the terms of their policy of insurance. It is upon this knowledge that the jury

¹ *Ante*, p. 285.

² 13 Iowa, 375.

must have concluded that the defendant was notified of the violation of the policy. The court refused to instruct the jury "that mere rumor, or that kind of knowledge which is acquired by an officer of a corporation in his individual capacity, is not sufficient to constitute notice to a corporation." "That notice of any fact, material in any particular case, must be given by some person having authority to give notice of such fact, to some one having authority to receive notice." "That the knowledge that C. H. Booth, P. A. Lorimier, and F. E. Bissell derived, as officers of the Odd Fellows Hall Association, will not be evidence against the Dubuque Mutual Fire Insurance Company, or tend to prove that the said insurance company had any knowledge that stage scenery was or had been used in the building insured."

We think that the refusal of the court to give these instructions was error.

The knowledge that an officer acquires by rumor, or by information in his individual capacity, should not be considered as constructive notice to the company. Such officer may receive such information, without knowing how far it affects the rights of the company he represents. The policy, with its conditions, is not under his control, or in his possession, nor can he be required to retain in his mind the conditions of the insurance in each policy, so that, when he walks the street, stops at a business house, or attends a theatre or place of public worship, he is to take notice of the acts of persons insured, and report to the board of directors all he has seen or heard, so that the company may be advised whether their outstanding policies are being violated or not.

In the case of the *Fulton Bank v. N. Y. Sharon Canal Co.* 4 Paige, 127, it was held "that the directors or trustees of a corporation when assembled as a board are the general agents of the corporation, and notice to them when so assembled is notice to their successors, and to the corporation. But notice to an individual director, who has no duty to perform in relation to the subject matter of such notice, is not a good constructive notice to the corporation."

In the case of the *National Bank v. Norton et al.* Cowen, J., after citing the ruling of different courts upon this subject, says: "These cases show what is indeed quite plain, that the acts of a director, or other officer of a corporation, unless official or in

Limitation Clause. — Waiver of Notice of Loss. — Time of Suit.

respect to his agency, are no more operative as against the institution than the acts of any ordinary corporator, and these no more than the acts of a stranger." See also *Farmers' and Citizens' Bank v. Payne*, 25 Conn. 444; *Bank of the United States v. Davis, et al.* 2 Hill, 451. Reversed.

PATRICK vs. FARMERS' INSURANCE COMPANY.¹

(Supreme Court, New Hampshire, June, 1862.)

Limitation Clause. — Waiver of Notice of Loss. — Time of Suit.

The limitation clause held valid.

A defect in the time of giving notice of loss stands on different ground from defect in the matter of the notice.

The former may be waived, but it requires different evidence from what would be sufficient as to the latter.

A vote of the company to indefinitely postpone the plaintiff's claim held not a waiver of the requirement of notice within a certain time. Consideration of the question whether suit in this case was brought within proper time.

BELL, C. J. We are not aware that any doubt has been entertained of the validity of a stipulation in a policy of insurance, that notice shall be given of a loss within a limited time. When such a clause is inserted in a policy itself, it generally assumes in its terms the form of a condition precedent, until the performance of which, no obligation arises to make good the loss. In other cases as in this, the provision may be contained in the charter of the company. In either case, the nature of the provision is such that it must be wholly inoperative if it is not construed as a condition precedent; so that the questions which have been decided by the courts have been chiefly as to what constitutes a compliance with the condition. *Bumstead v. Dividend Insurance Company*, 2 Kern. 81;² *Schenk v. Mercer Insurance Company*, 4 Zab. 447;³ *Bilbrough v. Mutual Insurance Company*, 5 Duer, 587, ante; *Francis v. Somerville Insurance Company*, 1 Dutch. 78, ante; *Kernochan v. New York Bowery Insurance Company*, 17 N. Y. 428, ante; *Clark v. N. E. Insurance Company*, 6 Cush. 342.⁴

The charter requires that notice shall be given, in writing, of the loss, to the directors, or one of them, or to the secretary, within thirty days after the loss. Notice of this loss, occurring December 19, 1855, was given to the company August 21, 1856. This notice was not in compliance with the charter as to time,

¹ 43 N. H. 621.

² Ante, vol. 3, p. 775.

³ Ib. p. 712.

⁴ Ante, vol. 3, p. 131.

however it might be in other respects. It was more than seven months after the loss. But it is said this defect is of a class which may be waived. Every one may renounce a law which is made for his benefit. Broom Leg. Max. 547; *Beaufages' Case*, 10 Co. 101. Any notice whatever may be waived, any informality in it, or neglect of due time. *Aetna Insurance Company v. Tyler*, 21 Wend. 401; ¹ *Kernochan v. New York Bowery Insurance Company*, 17 N. Y. 483.

It is claimed that the letter of the secretary, that "the directors had voted indefinitely to postpone the subject," is a waiver of any objection to the time of the notice, that if the company intended to insist upon the want of seasonable notice, they should have expressly disallowed the claim on that ground.

The authorities are quite distinct, that if the notice given is defective or erroneous, and the insurance company put their refusal to pay the loss on other grounds, that is a waiver of this condition of the contract. 2 Kern. 81; 4 Zab. 447; 5 Duer, 587; 1 Dutch. 78, *ante*. An objection of error in this notice, not suggested till the trial, was held to be waived. 17 N. Y. 428; 6 Cush. 342; *Peoria Insurance Company v. Lewis*, 18 Ill. 553, *ante*; *Underhill v. Agawam Insurance Company*, 6 Cush. 445; ² *Vos v. Robinson*, 7 Johns. 192; 21 Wend. 401; *Heath v. Franklin Insurance Company*, 1 Cush. 257, 264; ³ *Noyes v. Washington Insurance Company*, 30 Vt. 659, *ante*.

In none of the cases does the objection of defective notice go to the time of giving it. They all relate to some deficiency of the matter, or form of the notice, and they generally treat it as not acting in good faith on the part of the insurer, that he should not give notice of a defect which there was time to remedy. 3 Smith, 433.

A defect in the time of the notice stands on different ground from a defect in its matter; while the last, upon notice, may be remedied, it is otherwise with the former; which is necessarily irremediable, if the insurer chooses to insist upon it. It may be waived, but it would be reasonable to require a different kind of evidence from that which ought to be satisfactory, in cases of mere defect of form. The silence of an insurance company, upon a defect in the form of the notice, might be very injurious to the assured, but it is not at once seen how the assured could be benefited by notice that he had failed to give information of his loss

¹ *Ante*, vol. 1, p. 576.² *Ante*, vol. 3, p. 140.³ *Ante*, vol. 2, p. 634.

within the stipulated time, or how he could be prejudiced by the omission.

The directors of the insurance company did not do as we think they ought always to do, decide distinctly the question referred to them by the charter, that is, "ascertain and determine the amount of the plaintiff's loss or damage," but seem, in form, to decline to act on the subject. "Their vote was to indefinitely postpone the same." No reason is assigned for this course, and it does not therefore fall within the class of cases where the company refuse to pay the loss for other reasons than the defects of the notice, and we think no inference can be drawn that the company intended to waive any ground of defence, and that no waiver of any other than merely formal grounds can be fairly inferred from their silence.

The form of this note is ambiguous as to the effect. If regarded as a refusal to decide, its effect would be very different from a refusal to allow the claim, and we think the vote in this case may be regarded rather as a refusal to allow anything on account of the claim than as a refusal to ascertain and determine the amount of the loss or damage. In legislative bodies, from which this phrase is borrowed, an indefinite postponement is regarded as a denial of the claim.

This question may be regarded as material in connection with the next question of the case, whether the suit was seasonably commenced. In *Nute v. Hamilton Insurance Co.* 6 Gray, 177, *ante*, it is held that a stipulation in a policy or by-law, by way of condition precedent to their liability, that no recovery shall be had unless suit is brought within a certain time, is a valid condition, and unless it is complied with there can be no recovery; and it is said it had been so held in cases recently decided; and the same point was decided in *Amesbury v. Bowditch Insurance Co.* 6 Gray, 596, *ante*; *Fulham v. New York Insurance Co.* 7 Gray, 61, *ante*; *Wilson v. Aetna Insurance Co.* 27 Vt. 99, *ante*; *Brown v. Roger Williams Insurance Co.* 5 R. I. 394, *ante*; *Cray v. Hartford Insurance Co.* 1 Blackf. 280; *N. W. Insurance Co. v. Phoenix Oil Co.* 31 Penn. 448, *ante*. These authorities seem to us to be decisive that such a stipulation, as to the time of bringing the action, is valid.

In the case of *Nevins v. Rockingham Insurance Co.* 25 N. H. 22, it was determined, agreeably to the decision in *Boyden v. Middlesex Insurance Co.* 4 Met. 212, that under the charter of

Title to Property. — Transfer of Interest. — Insurable Interest. — Executors.

an insurance company similar to that of the defendants, if the directors do not proceed to act on the question of the amount of a loss within three months after it has been duly notified to them, the assured may bring his action to recover the loss; and in such case the provisions of the charter, requiring the action to be brought at the next term of the court, do not apply; the court holding that these provisions all appear to contemplate a case where a loss has been admitted, and the amount fixed by the directors, and the only question is, whether the insured is entitled to recover more. But in Vermont, it has been held that the provision applies equally to the case where the directors have duly and seasonably considered the question of loss and determined to pay nothing. *Williams v. Vermont Insurance Co.* 20 Vt. 222;¹ *Dutton v. Vermont Insurance Co.* 17 Vt. 369.² These decisions seem to us to be founded in sound reason, and the decisions there and here may well stand together, as to the points decided. It was not necessary in the case here to determine the latter question, since on either view that action was well brought, and it was left by the court undecided.

The policy of the charter seems to be to provide for a speedy settlement of claims for losses, which must unavoidably be productive of serious inconvenience to all concerned, if long left in an unsettled condition; and the evil is quite as great where the directors have refused to allow anything in a case of loss, as where they have allowed a sum too small to satisfy the claimant. The directors have in both cases performed their duty, so that in that respect the company is chargeable with no fault.

We are, therefore, of opinion that the plaintiff is bound by his neglect to give seasonable notice of his loss, as well as by the neglect to commence his action within the time limited by the charter. We think the notice to Emery can avail nothing. It was not in writing, and was not made to any of the directors, or the secretary; and its sole purpose seems to have been to obtain a discharge of the policy. *Judgment for the defendants.*

PHELPS vs. GEBHARD FIRE INSURANCE CO.³

(Superior Court, New York, June, 1862.)

Title to Property. — Transfer of Interest. — Insurable Interest. — Executors.

A person is not bound to specify his interest in the property insured unless inquiry is made. In the absence of any prohibition of a transfer of interest, the death of the insured and a

¹ *Ante*, vol. 2, p. 622.

² ¹ *Ante*, vol. 3, p. 387.

³ 9 Bosw. 404.

Title to Property. — Transfer of Interest: — Insurable Interest. — Executors.

renewal of the policy by the executors, and a conveyance of the property taking back a mortgage for the purchase money, does not avoid the policy.

Executors to whom real property is devised have an insurable interest therein.

By the Court, BOSWORTH, C. J. At the date of the policy (December 4, 1857), the assured resided in the city of New York. The policy does not so state, nor is the fact directly proved. He died on the 18th of May, 1858, having left a last will and testament, which was duly proved before the surrogate of the county of New York, and letters testamentary were issued thereon to the executrix and executor therein named, July 30, 1858. The plaintiff and John L. Mason (since deceased), qualified as executrix and executor. The fact of the residence of all these parties in the city of New York was so well known that no mention appears to be made of it, either in the policy, pleadings, proofs, or points made on this appeal. Of course the insured property was not supposed to be occupied by the testator personally when the policy was made, but it was known that it was not.

It does not appear that any representation was made that the testator owned it in fee, nor does it appear that any questions were asked on the subject. The description of the property in the policy as "his frame dwelling-house" and "his frame barn" would not, in case of a loss in his lifetime, make it indispensable to his right to recover, that he should prove he owned them in fee. *The Aetna Fire Insurance Co. v. Tyler*, 16 Wend. 885.¹ His death did not terminate the policy. *Burbank v. Rockingham Mut. Ins. Co.* 4 Foster, 550.² If he had conveyed the property in his lifetime, taking back, *eo instanti*, a mortgage to secure the purchase money, he would, notwithstanding, have had a continuous interest in the property. That fact would not have forfeited the policy under the clause which declares that "in case of any transfer or termination of the interest of the insured" in this policy, "either by sale or otherwise," without the consent of the corporation, manifested in writing, "this policy shall from thenceforth be void and of no effect." The provision in this policy, on this subject, is in the words of that in *Smith v. Saratoga M. F. Ins. Co.* 1 Hill, 497,³ and it was there construed to refer to a transfer of interest in the policy, and not to a change of interest in the property insured.

Nor would a conveyance by the assured in his lifetime, and

¹ *Ante*, vol. 1, p. 576.

² *Ante*, vol. 3, p. 367.

³ *Ante*, vol. 2, p. 94.

Title to Property. — Transfer of Interest. — Insurable Interest. — Executors.

taking back, *eo instanti*, a mortgage to secure the purchase-money, have been a bar to a recovery, in case of a subsequent loss in his lifetime, and during the term for which the property was insured. *Morrison v. Tennessee M. & F. Ins. Co.* 18 Missouri, 262;¹ *Norcross v. Insurance Companies*, 17 Penn. St. 429.²

There is no provision in the policy which, in terms, declares that it should, in such a contingency, become null and void. On general principles, the fact of a change in the nature or extent of the assured's interest in the property would not invalidate the policy, the interest having been continuous from the inception of the policy to the time of the loss, and the risk not having been increased.

We think that the rights of the present plaintiff to recover are quite as clear, if not more free from doubt, than those of the testator would have been were he living, and a certificate of renewal had been issued to him after conveying, and taking a mortgage of the premises to secure the purchase money, and a loss had occurred after such renewal. After the death of the testator, and on the third of December, 1858, the company issued a certificate of the renewal of the policy for one year, on a receipt of the premium therefor, from "the estate of Anson G. Phelps, Jr."

On the 30th of November, 1859, a further or second certificate of a renewal of the policy for one year from the 4th of December, 1859, was executed and delivered on a receipt of the premium therefor from "Mrs. Jane G. Phelps, executrix, and John L. Mason, executor of A. G. Phelps, Jr."

On the 3d of December, 1860 (John L. Mason having died in the mean time), the company issued a further certificate of the renewal of the policy for one year from the 4th of December, 1860, on the receipt of the premium therefor "from Mrs. Jane G. Phelps," &c.

The loss occurred on the 14th of February, 1861. No representations were made, and no questions were asked at the time of either renewal, as to the nature or extent of the interest designed to be protected by extending the policy and continuing it in force.

The company knew that Anson G. Phelps, Jr., was dead, and the renewals were not granted to keep him insured on property owned by him in fee; whether the estate had been devised by his will to his executors, in fee upon specified trusts, or whether

¹ *Ante*, vol. 3, p. 527.

² *Ib.* p. 284.

they had been clothed with authority to sell, and had exercised that authority, and in so doing had taken a mortgage to secure the purchase money, the company did not consider it important to inquire. The plaintiff did not misrepresent, and has not practised bad faith, and has done nothing subsequent to any renewal to increase the risk.

Since the renewal granted to "Mrs. Jane G. Phelps," &c, above, there has been no change in her condition as to the property; she was then a mortgagee of the premises, under a mortgage to her as executrix, and continued to be such up to the time of the loss.

Executors, as such, are merely representatives of the personal property of a deceased; as mere executors, they have no interest in or control over the real estate of their testator. When property is devised to executors in trust, they act *quoad hoc* as trustees, and account for their acts in regard to the real estate so devised as trustee. 2 R. S. 82, § 6; *Ib.* 94, §§ 65 and 66. By chapter 272 of the Laws of 1850, the powers of the surrogate were extended, in the matter of settling the accounts of trustees created by a last will and testament.

Whatever may be the legal effect of granting the several renewals, under the circumstances under which they were made; and whatever may be the obligation thereby imposed on the insurance company, there are no words found either in the policy or in the renewal certificates which (being construed in their usual acceptation), declare in terms such legal effect, or the nature and extent of such obligation.

Looking at the parties intended to be insured by the grant of the renewal certificates, and considering the facts that executors merely as such can have no interest in the real estate owned by the testator at the time of his decease, but may be made by the will trustees of the real estate, with a power to sell on credit, or may be invested with a naked power to sell and convert, and to sell wholly or in part on credit, and that no representations were made or questions asked; the insurance company must be deemed to have intended to insure, and to have insured such interest in the real estate in question as had become vested in the executors by the terms of the will, and by their lawful acts in the due exercise of the powers conferred on them thereby, and the grant of letters testamentary to them thereon.

The risk originally taken not being increased by this con-

Certificate of Loss. — Evidence. — Acts of Agent. — Misrepresentation, etc.

struction of the policy, and this construction not being opposed to anything expressed in it, or by the fair import of either of its provisions, this construction should be maintained as obviously conforming to the intent of the insurer and insured, manifested by their acts and the circumstances under which they were performed.

The judgment should be affirmed.

BEAL vs. PARK FIRE INSURANCE CO.¹ (Supreme Court, Wisconsin, June Term, 1862.) *Agency. — Knowledge of Agent.*

Renewing a policy executed by one assuming to be agent is a ratification of his authority. An insurance company held bound by the knowledge of its agent as to the nature of the risk, and state of the title to the premises in a case where the policy was issued and renewed at the solicitation of the company, without written application on the part of the assured, and on the personal inspection and survey of the premises by its agents.

PHOENIX INSURANCE CO. vs. LAWRENCE et al.²

(Court of Appeals, Kentucky, Summer Term, 1862.)

Certificate of Loss. — Evidence. — Acts of Agent. — Misrepresentation. — Levy of Execution. — Alienation. — Storing. — Practice.

Where a condition of a policy of insurance requires the insured to deliver an account of their loss with their oath or affirmation declaring the account to be true and just, &c., the affidavit of the insured is admissible to prove a compliance with such condition, but for no other purpose, and the court should so inform the jury.

If a policy of insurance has ceased to have any effect, by reason of the insured having kept prohibited articles in the house, a promise by the insurer's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, will not bind his principal.

A firm obtained insurance upon a storehouse, and the stock of goods therein, for a separate sum. The interest of the insured in the house was incorrectly described in the policy as belonging to the firm, whereas it was the property of one of its members. In a suit brought to recover for the loss of the goods, held, in the absence of proof that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods, that this does not vitiate the insurance on the goods.

The constructive possession of the sheriff by virtue of the levy of an execution upon goods which have been insured, where the insured retains the actual possession, does not vitiate the policy. Otherwise where a conveyance is made which terminates the interest of the insured in the goods.

Although a policy of insurance contains a clause prohibiting "any transfer of the interest of the insured by sale or otherwise," without the consent of the insurer, yet a deed made by the insured, conveying the goods to assignees in trust to pay creditors, will not render the policy void, the insured retaining the actual possession of the goods.

If, by the terms of a policy of insurance, the keeping or storing of certain articles on the insured premises is prohibited during its continuance, and the policy only suspended whilst they are so used, the policy is not thereby rendered void.

The conditions and enumerations of hazards form parts of the policy, and if articles prohibited by the policy (whether by provisions in the body of it or annexed to it) are kept by

¹ 16 Wisc. 241.

² 4 Met. (Ky.) 9.

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the insured, the burden is not upon the insurer to show that the keeping thereof caused the loss or increased the risk. But the keeping of such articles by the insured, when the policy was obtained, did not render it void unless they concealed that fact from the insurer.

In an action against an insurer, the defendant, not being presumed to know what prohibited articles were kept by the plaintiff when the loss occurred, is not bound to specify them in his pleadings. But where he specifies some, without alleging that any others were kept, the jury should not be permitted to consider any except those specified.

BULLITT, J., delivered the opinion of the court.

The appellant, for a premium of \$14, insured J. B. Lawrence & Co. against loss by fire, from the 25th May, 1858, to the 25th May, 1859, "to the amount of \$200 on their frame storehouse, situated on the Ohio River, in Gallatin County, Kentucky, known as Jackson's Landing, and \$1,200 on their stock of goods in said storehouse."

The policy contains this clause: "The interest of the assured in this policy is not assignable unless by the consent of this company manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void."

It also contains this clause: "In case the above mentioned premises shall at any time . . . be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated *hazardous* or *extra hazardous*, or specified in the memorandum of *special hazards*, in the terms and conditions annexed to this policy, or for the purpose of storing therein any of the articles, goods, or merchandise in the same terms and conditions denominated *hazardous*, *extra hazardous*, or included in the memorandum of *special hazards*, except herein specially provided for or hereafter agreed to by this company in writing, to be added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect."

One of the conditions annexed to the policy declares that "applications for insurance must specify . . . in relation to the insurance of goods and merchandise, or other personal property, whether or not they are of the description denominated *hazardous*, *extra hazardous*, or included in the memorandum of *special hazards*. And a false description by the assured of a building, or of its contents, or the concealment of any fact touching the risk to be assumed, . . . shall render absolutely void a policy

issuing upon such description. . . . If, after insurance is effected, the risk is increased by any means within the control of the insured; or if such building or premises shall be so occupied in any way as to render the risk more hazardous than at the time of insuring, such insurance shall be void."

There is annexed to the policy an enumeration of *not hazardous* goods, &c., viz.: "Staple foreign dry goods in packages, and staple domestic dry goods in stores where no hazardous merchandise is kept, and household furniture in dwelling-houses," which "may be insured at five cents per \$100 in addition to the rate of the building;" and an enumeration of hazardous goods, &c., viz.: oil, sulphur, grocer's stock, tallow, and several other articles, which "subject the building and all its contents to an additional charge of ten cents per \$100;" and dry goods (general stock of), boots and shoes, flour, teas, and other articles, which "are charged ten cents per \$100 in addition to, but do not increase the rate of the building;" and an enumeration of extra hazardous goods, &c., viz.: rosin, spirits of turpentine, and other articles, which "subject the building and all its contents to an additional rate of 20 cents per \$100; and china unpacked, fancy goods, and other articles, which are charged 20 cents per \$100 in addition to but do not increase the rate of the building;" and a memorandum of special hazards, in which it is declared that "gunpowder, phosphorus, and saltpetre are expressly prohibited from being deposited, stored, or kept in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent *in writing* on the policy."

Said house and goods were destroyed by fire on the 5th April, 1859, and Lawrence & Co. afterward assigned their claim upon the policy to L. J. Eggleston, and joined him in bringing this suit for his benefit, asserting no claim for the loss of the house, but claiming \$1,200 for the loss of the goods, and alleging in their petition that the defendant, by its authorized agent, had ascertained the amount of the loss, and promised to pay said sum of \$1,200.

The defendant denied the alleged promise, and resisted a recovery upon the following alleged grounds, among others: 1. That Lawrence & Co., when they obtained the insurance, represented themselves as the owners of said house, when in truth they were not. 2. That they had sold and disposed of the goods before

the loss, and had no interest therein when the loss occurred. 3. That said house, at the time of the fire, was used to keep and store gunpowder, sulphur, rosin, turpentine, and oil.

There was evidence conducing to prove that the adjusting agent of the defendant, after inquiring into the loss, had promised to pay the said sum of \$1,200.

It appeared that said storehouse belonged, not to Lawrence & Co., but to Lawrence, a member of the firm, — there was no evidence of any representation on the subject except that furnished by the policy.

It appeared that on the 22d March, 1859, the members of said firm signed a deed conveying said goods to Casey & Yeager, in trust to pay debts due to them and other creditors of Lawrence & Co., but there was conflicting evidence upon the question whether or not the deed had been delivered and accepted, so as to take effect between the parties. And there was evidence conducing to prove that an execution remaining in the sheriff's hands had been levied on the goods, which, however, were left in the possession of Lawrence & Co.

There was evidence conducing to prove that sulphur, rosin, turpentine, oil, and saltpetre were in the house, forming part of the stock of goods at the time of the fire.

There was no evidence that any inquiries were made of the insured as to the character of their stock of goods; no evidence except that furnished by the policy, either as to the character of the goods, when the insurance was obtained, or as to the representations of the insured upon the subject; and no evidence as to the ordinary rate of insurance upon goods not hazardous.

The plaintiffs obtained a verdict and judgment for \$1,294, being the amount insured upon the goods, with interest, from which judgment the defendant appealed.

1. The first question relates to the affidavit of the plaintiff, J. A. Eggleston, one of the firm of Lawrence & Co., which the plaintiffs were permitted to read to the jury. The eighth condition of the policy required the insured to deliver an account of their loss, with their oath or affirmation, declaring the account to be true and just, and several other facts. The defendant denied that the plaintiffs had complied with that condition. Eggleston's affidavit was admissible to prove such compliance, but for no other purpose, and the court below should have so informed the jury.

2. The next question relates to the effect of the alleged promise by defendant's agent to pay the loss upon the goods. The court below instructed the jury, in substance, that though the policy had ceased to have any force or effect, by reason of the plaintiffs having kept prohibited articles in the house, yet, if the defendant's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, promised to pay said loss, that they must find for the plaintiffs. This we conceive was erroneous, for two reasons: *First*. Authority to the agent to adjust and pay losses would not give him a right to pay out the money of the defendant where no loss had been sustained, much less to bind the defendant by a promise to do so. *Secondly*. Conceding the most ample authority to the agent to bind the defendant, yet if the policy was void at the time of the fire, there was no consideration for the promise to pay the loss. We are not prepared to admit that the premium paid to the defendant, in consideration of its agreement to assume the risk, formed even a moral consideration for its promise to pay a loss sustained by the plaintiffs after they had vitiated the policy by violating its conditions. As this instruction was given at a former trial, at which the plaintiffs obtained a verdict for \$1,200, that verdict was properly set aside by the circuit judge, though not for that reason.

3. It is contended that the policy was void because J. B. Lawrence & Co. did not own said storehouse, and that the court below erred in refusing so to instruct the jury.

Whether or not the insurance upon the house was void, we need not decide. Conceding that it was, it does not necessarily follow that the policy was void as to the goods, which were insured for a separate sum. In many cases policies have been held valid, though the interest of the insured was not correctly described. 1 Phillips on Ins. § 640. In the absence of evidence it cannot be presumed that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods. Policies upon goods in rented houses are not unusual. Upon the facts as presented, we perceive no reason for excepting this case from the general rule by which a policy making separate insurance upon several subjects is treated as separate policies would be. Where a policy made separate insurance upon two build-

ings, with a clause declaring it void if the insured should alienate the property insured, it was held that an alienation of one of the buildings did not avoid the policy as to the other. *Clark v. New England Mutual Insurance Company*, 6 Cushing, 342.¹ That is an authority for the proposition, that if Lawrence & Co. had owned the house, and had sold it after taking the policy, this would not have vitiated the insurance on the goods, though it might have diminished their interest in preserving the house, and, consequently, their interest in preserving the goods. And in the case of *Loehner & Co. v. Home Mutual Insurance Company*, 17 Miss. (2 Bennet) 247,² it was held that a policy upon a house and its furniture, though void as to the house, because the insured failed to give notice of an incumbrance, was not therefore void as to the furniture. We perceive no reason for applying a different principle in this case.

4. The defendant asked the court to instruct the jury that "if they believe that the possession of said goods was taken from J. B. Lawrence & Co. by the sheriff or any other person or persons, such change of possession voided the policy, and defendant is not liable upon it." In our own opinion that instruction was properly refused.

There was no evidence that any one had taken the actual possession of the goods from Lawrence & Co.

Conceding that the sheriff had a constructive possession of the goods, by virtue of the levy of an execution upon them, still, Lawrence & Co., having the actual possession, had the same power, as well as the same interest, to preserve them which they would have had if the execution had not been levied; and the policy continued in force notwithstanding the levy. *Clark v. New England Mutual Fire Ins. Co.* 6 Cushing, 354.

The deed to Casey & Yeager presents a more difficult question. If that deed had taken effect between the parties, it gave to Casey & Yeager constructive possession of the goods; and if it terminated the interest of the insured in the goods, or if it was a transfer of their interest within the clause of the policy previously cited, it avoided the policy, and the court should have modified the instruction accordingly, instead of overruling it.

The deed, conceding that it was delivered and accepted, certainly did not terminate the interest of the insured. No release

¹ *Ante*, vol. 3, p. 131.

² *Ib.* p. 445.

had been executed by their creditors. They were as much interested in preserving the property, so that it might be applied to the payment of their debts, as if they had retained the legal title. They unquestionably had an insurable interest.

But the question remains, did not said deed, if delivered and accepted, render the policy void under the clause prohibiting "any transfer of the interest of the insured by sale or otherwise," without the consent of the insurer? In 1 Phillips on Insurance, § 880, the case of *Dadmun Man. Co. v. Worcester Mut. Fire Ins. Co.* 11 Metc. 429,¹ is cited as a decision, that, under such a clause, the policy is rendered void by an assignment by the assured to assignees for the benefit of certain of his creditors. But in that case, before the loss occurred, the property was sold under an order of court, in a suit against the assured and his assignees, and the assured had thus been deprived of all interest in it.

It has been repeatedly decided, with reference to policies containing similar clauses, that the policy is not rendered void by a mortgage of the property; *Conover v. Mutual Ins. Co. of Albany*, 1 Comst. 290; 3 Denio, 254;² *Fulsom v. Belknap Mutual Fire Ins. Co.* 10 Foster, 231, *ante*; nor by a sale and conveyance, the grantee having simultaneously reconveyed to the grantor in mortgage; *Stetson v. Mass. Mutual Ins. Co.* 4 Mass. 330;³ nor by a conditional sale; *Tittmore v. Vermont Mutual Fire Ins. Co.* 20 Vermont, 546;⁴ nor by a contract to sell and convey at a future day, the purchaser agreeing on that day to pay a certain sum and secure the residue of the purchase money; *Masters v. Madison Co. Mutual Ins. Co.* 11 Barb. S. C. R. 624;⁵ nor by a sale under an execution, whilst the assured has a right to redeem, at least in the absence of proof that the said right is of no value; *Strong v. Manufacturers' Insurance Co.* 10 Pick. 40.⁶ In most of those cases there had been a technical transfer of the title and interest of the insured; in none of them did the insured retain a greater interest in the property than Lawrence & Co. did in the goods assigned to Casey & Yeager, admitting that the deed had taken effect.

The instruction given at the instance of the plaintiffs, that said deed did not pass the title to the goods, unless "Casey & Yeager accepted of the same and received and took the posses-

¹ *Ante*, vol. 2, p. 488.² *Ib.* p. 677.³ *Ante*, vol. 1, p. 81.⁴ *Ante*, vol. 2, p. 683.⁵ *Ante*, vol. 3, p. 398.⁶ *Ante*, vol. 1, p. 326.

sion and control of such goods," was clearly erroneous; but was not prejudicial to the defendant, because the deed, though it may have passed the title, did not avoid the insurance.

5. The defendant asked for an instruction, "that if any of the articles denominated *hazardous*, *extra hazardous*, or included in the memorandum of *special hazards* were kept or stored in said storehouse during the continuance of said policy, that it became void."

It is clear that this should not have been given, because the keeping of those articles, after the issuing of the policy, if prohibited by it, did not, as the instruction assumes, render the policy void, but only suspended it whilst the premises were so used.

6. The defendant asked for an instruction, "that if any articles denominated in the classes of hazards, *hazardous*, *extra hazardous*, or included in the memorandum of *special hazards* were embraced in the stock at the time of the issuing of the policy, or if the premises were used in keeping or storing any of the above prohibited articles at the time of the fire, then the said policy is void."

There was neither proof nor allegation authorizing that instruction.

This case cannot be placed upon the same footing as that of the *Ky. & Louisville Mutual Ins. Co. v. Southard*, 8 B. M. 634,¹ cited by plaintiffs' counsel. The conditions and enumerations of hazards above mentioned formed parts of the policy, as perfectly as if they had been inserted in the body of it. If therefore the keeping by the plaintiffs of the articles mentioned in the instruction was prohibited by the policy (whether by provisions in the body of it or annexed to it), it was not necessary for the defendant to show that the keeping thereof caused the loss or increased the risk. 1 Phillips on Insurance, § 866.

But the keeping of such articles by the plaintiffs, when they obtained the policy, did not render it void, unless they concealed that fact from the defendant.

There was no evidence as to what articles composed their stock at the date of the policy. At the date of the fire the stock embraced dry goods, fancy goods, groceries, boots and shoes, and many other articles denominated in the policy *hazardous* or *extra hazardous*. If that fact authorized the jury to infer that the

¹ *Ante*, vol. 2, p. 765.

stock embraced the same or similar articles at the date of the policy, they might perhaps have also had a right to infer that the defendant knew that the stock embraced those articles, or waived being informed concerning them. Angell on Fire & Life Ins. § 176; 1 Phillips on Ins. § 571; *Carter v. Boehm*, 8 Burrow, 1905. And if it had appeared to the satisfaction of the jury that the defendant, when the policy was issued, knew that such articles were embraced in the stock, and were kept by the plaintiffs for sale, as part of their regular business, possibly the issuing of the policy upon that stock of goods authorized the plaintiffs to keep those articles for sale, notwithstanding the prohibition contained in the printed parts of the policy. *Bryant v. Poughkeepsie Mut. F. Ins. Co.* 21 Barbour's S. C. R. 154, *ante*; *Delonguemare v. Tradesman's Ins. Co.* 2 Hall, 589;¹ *Moore v. Protection Ins. Co.* 29 Maine, 97;² *Leggett v. Aetna Ins. Co.* 10 Rich. Law Reports, S. C. 202, *ante*.

But we need not decide these questions, and do not propose now to express any opinion concerning them, because the defendant's pleadings do not allege that any such articles were kept in the store when the policy was issued, or that the plaintiffs made any concealment with reference thereto. Hence the jury would have had no right to declare the policy void, even if it had been proved that, when it issued, the plaintiffs kept those articles and concealed the fact from the defendant.

That part of the instruction which relates to the keeping "of any of the above prohibited articles at the time of the fire" was also erroneous, because the defendant's pleadings charged the plaintiffs with having kept certain specified articles without charging them with having kept any others. The defendant, not being presumed to know what prohibited articles were kept by the plaintiffs, was not bound to specify them in its pleadings. But having done so, specifying some without alleging that any others were kept by plaintiffs, the jury should not have been permitted to consider any except those specified.

The other instructions we need not notice. Upon the return of the cause the defendant should be permitted, if it chooses, to amend its answer.

The judgment is reversed, and the cause remanded for a new trial, and other proceedings consistent with this opinion.

¹ *Ante*, vol. 1, p. 289.

² *Ante*, vol. 2, p. 758.

Negligence.

JONATHAN JOHNSON vs. BERKSHIRE MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, September Term, 1862.)

Negligence.

Mere negligence on the part of a person insured, which is the direct cause of a loss by fire, is not a defence to an action upon the policy, if he acted in good faith, and his negligence did not amount to recklessness and wilful misconduct.

CONTRACT upon a policy of insurance upon the plaintiff's barn and grain therein, issued by the defendants. A trial by jury was waived in the superior court, and the case was heard before Ames, J., who found the following facts: In the afternoon of a hot day, in a dry season in August, 1859, during the time covered by the policy, the plaintiff and his son were unloading hay from a wagon and placing it in a shed adjoining the barn, and while so engaged were annoyed by bees, whose nest was in a hollow place under the door at which they were pitching in the hay; and the plaintiff, finding that no hot water could readily be had, undertook to smoke them out by thrusting a wisp of straw into their hole and lighting it with a match. A fresh breeze was blowing at the time; the building was very old, and covered on the outside with white wood boards; the barn adjoining was full of hay, and some hay was stored in the loft of the shed. After withdrawing the wisp of straw, and while attempting to extinguish it, the fire spread with great rapidity on the outside of the shed, and destroyed the property. It was admitted that there was no fraudulent intent on the part of the plaintiff. Upon these facts, the judge found that there had been a want of ordinary care, judgment, and discretion on the part of the plaintiff; that this default was the immediate and proximate cause of the fire; and that, although he acted in good faith, and the negligence and default on his part did not amount to recklessness and wilful misconduct, yet under the circumstances he was not entitled to recover.

The plaintiff alleged exceptions; and it was agreed that if the exceptions should be sustained, judgment should be entered for the plaintiff for the amount of the policy.

MERRICK, J. The defendants contend that the carelessness and negligence proved at the trial whereby the fire was caused, by which the barn and other property insured were destroyed, constitute a valid defence to this action. It is admitted that there

¹ 4 Allen, 388.

Negligence.

was no fraudulent intent on the part of the plaintiff in the commission of the acts from which the fire immediately resulted. But it was found as a fact by the court, the parties having waived a trial by jury, that there had been an omission to exercise ordinary care, discretion, and judgment on his part; and it was thereupon determined that, although he had acted in good faith, and his negligence and default did not amount to recklessness or wilful misconduct, he was not entitled to recover indemnity in this action for his loss.

This determination was erroneous. It is said to have been formerly doubted whether, in marine insurances, underwriters were liable for losses by fire occasioned by the negligence or mismanagement of the master or mariners at sea, but that now it is the better and established doctrine that they are liable where the acts are not of a barratrous character, and that this is applicable in all cases of such loss, whether occurring on land or at sea 1 Phil. Ins. §§ 1049, 1096. And in Angell on Ins. § 125, it is stated as an indisputable proposition, that as applied to policies against fire on land the doctrine has for a great length of time prevailed that losses occasioned by the mere fault of the insured or his servants, unaffected by fraud or design, are within the protection of the policies, and as such are recoverable from the underwriters. In *Shaw v. Robberds*, 6 Ad. & El. 75,¹ it is said by the court that the object of insurance is to guard against the negligence of servants and others; and that there is no ground of distinction between the negligence of strangers and others and that of the assured himself; and that in the absence of all fraud the particular cause of the loss is only to be looked at. And in *Huckins v. People's Ins. Co.* 11 Fost. N. H. 238, *ante*, it was distinctly held that carelessness and negligence as such cannot be held to be a defence to an action upon a policy of insurance; that, in the absence of fraud, it is only the proximate cause of the loss that is to be considered. The same doctrine was recognized by this court in the case of *Chandler v. Worcester Ins. Co.* 3 Cush. 328.² It is there said that the general rule unquestionably is, that in cases of insurance against fire the carelessness and negligence of the agents and servants of the assured constitute no defence. The defendants in that case offered to show not only that the plaintiff had been guilty of negligence, but also of gross misconduct. And the court, in examining the case, where the

¹ *Ante*, vol. 1, p. 621.² *Ante*, vol. 3, p. 20.

Waiver. — Assignment.

facts upon which the allegation of the gross misconduct imputed to the party were not reported, expressed an opinion that it might be of such character, though not amounting to a fraudulent intent to burn the building, as to deprive the assured of his right to recover; and this for the reason assigned, that the misconduct might be such as to manifest a willingness, differing little from a fraudulent and criminal purpose, to commit such an injury. But the law makes a clear distinction between even gross negligence and fraud, and although the former may be evidence tending to show *mala fides*, it is not, in fact, the same thing. 1 Parsons on Con. 571; *Goodman v. Harvey*, 4 Ad. & El. 870. In the present case, there is nothing in the facts found to show either a fraudulent intent or any willingness on the part of the plaintiff to set fire to the building. On the contrary, it is conceded he acted in good faith. And although his conduct was very imprudent, it is obvious, as well from his purpose as from his efforts to prevent the conflagration when the fire began to kindle, that he was actuated by no improper motive. These facts show a case of mere negligence, and therefore are not sufficient to preclude him from his right to recover on the policy an indemnity for his loss.

Exceptions sustained.

CARROLL vs. CHARTER OAK INSURANCE CO.¹ (Supreme Court, New York, September, 1862.) Waiver. — Assignment.

The policy in suit required notice of other insurance, and that the same should be mentioned in or indorsed upon the policy. The plaintiff offered to prove that at the time when the agent of the defendants received the premium for renewal, and in consideration thereof renewed the policy for another year, the defendant's agent was notified of the fact that other insurance had been obtained. *Held*, a valid waiver of the above requirement; and this, too, though the policy provided that none of its conditions could be waived "except in writing signed by the secretary."

The policy contained the usual prohibition of assignment. *Held*, not to prevent an assignment after loss.

As to the first point in this case, J. C. Smith, J., delivering the opinion of the majority of the court, said: "The defendants insist that their acts do not amount to a waiver by reason of the express provision of the policy that none of its conditions 'can be waived except in writing signed by the secretary.' But it was competent for the parties to rescind or modify this provision by a valid agreement, even in parol; and the executed

agreement to renew the policy clearly had that effect. 7 Cowen, 48; 9 Ib. 115. The parties having thus mutually agreed to depart from the provisions of the policy, as to the manner in which a waiver of the forfeiture in question should be manifested, the rights of the assured under the new agreement should be protected, especially after it has been completely executed on their part. 2 Seld. 279."

¹ 38 Barb. 402.

REUBEN H. RATHBONE vs. CITY FIRE INSURANCE CO.¹ (Supreme Court, Connecticut, October Term, 1862.) *Construction. — Hazardous Articles. — Evidence. — Removal of Goods. — Waiver.*

A policy of insurance upon personal property contained a condition that if the building in which it was kept should be used for the purpose of storing any of the articles denominated "hazardous," except as specially agreed to by the company and indorsed on the policy, the insurance should be void. The policy contained a schedule of articles denominated "hazardous," among which was "wine in casks," the same being placed under the head of articles considered hazardous on account of their liability to damage, but for which the rate on the building was not to be increased. *Held*, that a reasonable construction of this condition would make it apply only to the class of hazardous articles by which the risk to the building was increased.

But *held* that, however this might be, where the property was, with the consent of the insurance company indorsed on the policy, removed from the building—in which it was stored at the time of insurance to another, and wine in casks was at the time stored in the latter building, which fact was known to the agent of the company who consented to the removal, and no objection was made by him on account of it, the insurance was not vitiated by the fact of such storage.

Held, also, that the insured might show by parol evidence what representations he made as to the condition of the building to which the property was removed. These oral representations are not to be regarded as coming into conflict with the written representations of the policy. The latter pertain to the risk as it stood before the removal of the property, the former to the risk as it existed after the removal.

And the policy indorsed with an agreement for the removal of the property to another building, and for the continuance of the policy in force as to the property after removal, became in effect a new contract between the parties, and a new risk taken by the company.

And where some elements of the new risk existed which were forbidden by the original policy, but which were known to the company when the new risk was taken, their existence does not affect the validity of the new insurance.

Where the property was insured by the original policy to the amount of \$200, and after the policy was claimed to have been forfeited by the introduction of new elements of risk, the company, with full knowledge of the facts, by an indorsement on the policy added \$100 to the risk on the same property, and in the indorsement stated the whole risk as thus increased to be \$300, it was *held* that the forfeiture, if there was any, was waived by the company.

Where the condition was that the insurance should be void if articles denominated "hazardous" should be stored in the building *without the consent of the company indorsed on the policy*, and the agent of the company consented to the removal of the property to another building in which such hazardous articles were stored, and agreed to make whatever entry was necessary on the policy to continue it in force notwithstanding such storage, and took and retained the policy for the purpose, it was *held* that the agreement of the agent was a waiver by the company of the condition which required such written indorsement of consent, until such indorsement should be made.

Where the general agent of an insurance company, acting in the matter of his agency and in relation to the particular loss and controversy in question, stated to an agent of the plaintiff who had prepared and forwarded the preliminary proofs, that it was only the quantity and value of the property that the company disputed, it was *held*, that the evidence was both admissible and important as going to prove a waiver by the company of all objection to the preliminary proofs on account of defects in them.

¹ 31 Conn. 193.

Oral Contract. — Defective Policy.

KELLY vs. COMMONWEALTH INSURANCE CO.¹

(Superior Court, New York City, November, 1862.)

Oral Contract. — Defective Policy.

An oral contract of insurance, to take effect forthwith, though entered into contemporaneously with an agreement for a written policy, is binding until delivery or tender of such policy.

The terms of the written policy as to prepayment of premium have no effect in such case unless expressly adopted. Nor will a mere demand of payment without tender of a policy supersede the verbal contract.

Under such oral contract the insured may recover for a loss, though, after it occurred, and while the insurers were ignorant of it, he paid them the premium and received a written policy which was not binding on them by reason of not being properly executed.

By the Court, ROBERTSON, J. Under the evidence and charge to the jury in this case, the only embarrassment grows out of that part of the complaint which states a cause of action arising out of the execution of the policy, of which a copy is annexed. The testimony of Kelly, one of the plaintiffs, by itself, shows clearly the making of an independent oral contract to insure, irrespective of an agreement to deliver a policy. The question of the reliability of such testimony, and the making of such contract, were fairly left to the jury, as matters of fact. The only questions to be considered in regard to such contract are those raised by the requests to charge, to wit: Whether, as the parties contemplated the making of a policy in a certain form, the same conditions were grafted on such contract as would be contained in such form, and whether the tender of a policy in such form and demand of the premium, and the refusal of the latter, would not terminate the oral contract. I apprehend no such construction can be given to the original contract: otherwise if the policy had failed to be returned from Philadelphia before the beginning of the risk the plaintiffs would have been without insurance altogether. It certainly became binding the moment it was made, and the utmost effect that can be given to the additional promise to execute a policy in a certain form is that, upon the tender of that policy, and a demand of the premium, the oral contract should cease. But, in this case, no such policy was ever prepared; the only one prepared was one that declared it to be only obligatory when ratified by the agent for the defendants. Unless the defendants waived that condition when tendering it, if they ever made such tender, they could not

¹ 10 Bosw. 82.

Oral Contract. — Defective Policy.

escape from the continuing obligation of the oral contract. In regard to that branch of the case, the charge of the court as well as its refusal to charge, is unimpeachable.

So, too, the refusal to charge that Campbell was not the agent of the defendants, in regard to any material fact, is warranted by the facts. The only important point of his agency was his receipt of the policy. There was evidence that Hewson, the acknowledged agent of the defendants, employed Campbell to deliver the policy, and receive the premium. His delivery of it was, therefore, theirs, as he did not make it until he received the premium. There was no pretence that the delivery to Campbell was as the agent of the plaintiffs; indeed, the defendants contended to the contrary. In regard to the premium, it was actually paid before the policy was delivered, and its prepayment formed no part of the oral contract to insure. It was not necessary, therefore, to establish either its waiver, or any authority to waive it. What the parties intended in regard thereto is wholly immaterial, if such intent was not conveyed in the language by which the contract was formed. The payment of the premium, after the fire, did not affect the agreement between the parties; by the oral contract credit was given to the plaintiffs for it, at least until a proper policy should be tendered, and such premium demanded. The conflicting testimony of the plaintiff, Kelly, and Campbell's clerk (Crary) left it uncertain whether the premium was ever demanded, and the actual payment corresponded in time with Kelly's last promise to pay it; Campbell, at all events, in demanding the premium, for which he was the agent of the defendants, never dealt with the plaintiffs as though desirous of ending the oral contract, since he sent to them several times for it. I do not see how, if the defendants chose to carry out their agreement to execute a policy, by receiving the premium, its time of payment, whether before or after the fire, could make any difference. The only point remaining in the requests to instruct, except that as to the interview between one of the plaintiffs and a temporary representative of Campbell, is the refusal of the court to instruct the jury that the policy in question was inoperative, because it was not countersigned by the agent of the defendants.

The complaint clearly contains two causes of action, although, perhaps, not distinctly enumerated as such. The statement of

the second cause, growing out of the written policy, would necessarily have been insufficient to maintain a legal action, without the allegation of waiver of the countersigning of such policy by the agent for the defendants. In the absence of that, it might have been sustained as an action to compel the countersigning, and then to recover on such countersigned policy, which are causes of action that may be joined. *Bunten v. Orient Insurance Company*, 8 Bosw. 448. But the summons is merely for a money demand on contract, and there is no demand for relief, except damages. The complaint concedes the insufficiency of the policy, unless properly delivered and the signature of the agent waived; while the answer virtually admits its efficiency, if both those contingencies occurred. The request, therefore, to charge absolutely that "the policy was ineffective and inoperative, for the reason that it was not countersigned by the agent," was too broad and general, without the qualification, unless such signature by such agent was waived. A change in the form requested would have been, in substance, that nothing could atone for the absence of the signature. The defendants had a right to ask that the jury might be instructed, that unless the plaintiffs proved the waiver, they could not recover, because that was the issue; but not merely and absolutely that a policy in the same form, unsigned by the agent, was not binding, because no such issue was involved. Notwithstanding the change in the form of pleading, juries are confined in their findings to the issues actually made by them. Indeed, the court, by charging that the plaintiffs were entitled to recover, "if the policy was delivered to them, *nothing remaining to be done*, the defendants being competent to *waive any provision in their policy that it should not take effect unless certain things were done*," or, "if it was handed to them as *intended to be an effectual agreement binding on the defendants*," virtually conceded the effect of the conditions as to countersigning and prepayment of premium, and every other provision to render it inoperative, contained in it. It virtually said the converse; that if anything remained to be done, required by the policy to be done to make it binding, or if it was not intended to be an effectual agreement binding on the defendants, it was not so. Not much stress was laid, in the argument, upon this, and no great reliance was probably placed upon it at the trial.

The only remaining point as to which an instruction was re-

Oral Contract. — Defective Policy.

quested was, the conversation between one of the plaintiffs and Brewster, a temporary representative of Campbell; this was to the effect that what was said or done by the former to the latter was not a tender of the premium to the defendants. In the view I have taken of this case, it was not necessary for the plaintiffs to tender any premium; it was not alleged in the complaint, and the plaintiffs' case did not depend upon it. As to the exception taken to the admission of the conversation, it was properly overruled. The evidence shows that Campbell, being employed as a sub-agent by Hewson, to deliver the policy and receive the premium, and interested to earn his commissions as a broker, sent to Kelly to notify him the policy was ready; the latter went to the office of the former to procure a change in the policy, and found Campbell unwell in an adjoining office, who employed a friend (Brewster) to receive Kelly's communication; he did so, wrote a memorandum of it and put it in the policy, where it was seen by Campbell. It was sent by him to Hewson, but went to Kelly by mistake. Kelly had a right to show that he had not refused, but only delayed, with the defendants' assent, to pay the premium; that he went to Campbell's office to give his reason for such delay, and that such reason was communicated to Campbell. When they delivered him the policy and returned the memorandum, which return, he had reason to believe, was virtually a denial of his request, he promised to pay the original premium, and paid it at the time. The taking down of such conversation by Brewster, and the making of such memorandum and inclosing it to Campbell, were features in the dealings between the parties, to show that there never had been any intention to abandon the contract of insurance with the plaintiffs. The defendants, at that time, could have sued him for the premium and recovered; there was no reason why they should not be equally held for the insurance, unless, upon a tender of the policy and a peremptory demand by them for the premium, the plaintiffs had refused to pay it. The evidence was admitted in the first place, subject to be stricken out, if not connected with the defendants. The court instructed the jury that it was immaterial. No application was made to strike it out, but simply a request to pass upon its effect, while the defendants themselves introduced Brewster and Campbell to testify as to such conversation. Under such circumstances the exceptions should not prevail.

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Hewson's reasons for not signing the policy were wholly immaterial, and properly excluded. The question of the juror, which was objected to, "Would it have been a perfect policy, if he had paid the premium?" had once already been put and answered, without objection; it was not objected to until repeated, and seems to have been put more with a view either of calling the witness's attention to the impropriety of sending an imperfect policy to procure the premium, or inducing him to reflect whether he did so, or, perhaps, showing that the signing by the agent had been waived. It certainly was not designed to get at the witness's opinion on a mere question of law. There is one view in which, even in that aspect, the question was not objectionable. The policy purports to be made in the State of Pennsylvania, and, of course, should be governed by its laws, in its interpretation; the witness had been agent for an insurance company of that state, and might have been familiar with its laws upon that subject; at all events, the objection was not put upon the ground that he was not an expert, which the objector is bound to specify. I have not been able to find authority for the responsibility of a party for a juror's improper question; one has as much right to except to it as another, and neither has the power to withdraw it. It would be rather hard to make either party suffer for the illegal questioning of a juror. A more appropriate remedy would be to move to strike out the answer, or to call upon the court to direct the jurors to disregard it. But in this case the defendants were too late with their objection, after allowing the question to be asked and answered once without it.

Hewson clearly was not proved to be such an expert as to allow him to testify as to estimated damage, if such a mode of proof is admissible at all, and the question put to him to that effect was properly excluded.

From all the circumstances, it appears that the jury had a right to find that a valid oral contract to insure was made, determinable on the execution and delivery of a written contract; that such delivery and the rigorous demand of the premium, so as to terminate the oral contract, was delayed until after the fire; that the premium was then paid, and an imperfect policy delivered, intended to have been made perfect, by the defendants, on the payment of the premium. It is clear that for such premium

Fire Insurance Policy. — Construction of. — Waiver. — Interest. — Contribution.

the defendants, on the 28th of June, intended to have taken the risk of \$2,000 for a year; they had a right to stop the credit for the premium and the oral contract, by presenting a perfect policy and demanding the former. They did not exercise the right, and when a loss has occurred, they seek to evade it. Their agent did not put his objection to their liability, at first, upon any ground but the omission to countersign.

The judgment and order denying a new trial must be affirmed, with costs.

MUMA vs. NIAGARA DISTRICT MUTUAL INSURANCE CO.¹
 (Queen's Bench, Upper Canada, Michaelmas Term, 1862.) *Misrepresentation. — Incumbrances.*

To an action against a mutual insurance company defendants pleaded a false representation by the plaintiff on obtaining the policy, that the land on which the building stood was unincumbered, whereas in truth it was mortgaged to one S. for £94. The plaintiff called S., who proved that at the time of effecting the policy about \$100 was due on the mortgage, after allowing all proper credits, and that the plaintiff was not then entitled to a release as of right. *Held*, that the plaintiff could not recover, the policy being void under defendants' act of incorporation; Consol. Stats. U. C. ch. 52, § 27; and that evidence as to the value of the land was properly rejected.

The plaintiff replied, on equitable grounds, in substance, that he acted as agent for S., on the agreement that any moneys due to him for services should be credited on account of this mortgage; that before applying for the policy he delivered to S. a claim against a certain person, which S. accepted; that these moneys together then equalled the mortgage debt, and the same was then cancelled and paid, and S. ready to release the mortgage; that before applying the defendants delivered to plaintiff a printed form of application, and thereby required him to state that the land was unincumbered, and to make the statements in his application in the replication set forth, wherefore the plaintiff made such statement in his application, and by the procurement of defendants, and therefore the statement was not false or fraudulent.

Seem, that the replication, which was demurred to, was clearly bad; but as the evidence disproved it no formal judgment was given on the demurrer.

BALTIMORE FIRE INSURANCE CO. vs. BOUDINOT S. LONEY et al.² (Court of Appeals, Maryland, December Term, 1862.) *Fire Insurance Policy. — Construction of. — Waiver. — Interest. — Contribution.*

Where a policy of insurance provides that "goods held in trust or on commission are to be declared as such, otherwise the policy will not extend to cover such property," and it appears that the insured have obtained their insurance without making any specific statement of the nature of their interest in the goods destroyed. *Held*, 1st. That the insurer has a right to limit the extent of the risk by such condition. 2d. That a knowledge of that condition by the insured must be presumed from their acceptance of the policy, and it will have the effect of limiting the risk to the goods which belong to them.

Where the policy is entirely consistent with the terms of the application, free from ambiguity, and susceptible of a consistent construction in all its parts; if there be a mistake in the insurance effected, and it be not attributable to the insurer, the court will not look beyond the terms of the policy in ascertaining its meaning and legal effect.

¹ 22 Up. Can. Q. B. 214.

² 20 Md. 20.

Warranty. — Materiality.

Loney & Co. were insured in a Baltimore Company on their own goods, and in sundry foreign companies on their own goods and goods held on commission. The policy in the first company contained a clause that "the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater proportion of the loss sustained than the amount hereby insured shall bear to the whole amount of the several insurances." The whole insurances were insufficient to cover the value of the goods lost. The Baltimore Company refused to pay more than the proportion of the losses as stated in the above clause; *held*, that the foreign policies were not within the effect of the covenant relating to other insurances, and that the Baltimore Company is not entitled to any abatement of its liability on this policy by reason of them.

A policy provided for the payment of losses, within sixty days after the same should be ascertained and proved. The loss was proved, and demand of payment made within the time limited. The loss was also admitted by the insurance company, which offered payment of what it assumed to be the amount of its liability, but refused payment of the full amount of the insurance. *Held*, that the condition as to the time of payment was waived, and that the sum for which the insurers were bound became due and recoverable with interest from the date of the demand.

The right to contribution is based upon the concurrence of the policies, and the necessary incident of its existence is, that the several insurers should be bound with equal certainty, and in the same sense for the same loss.

SANDERS vs. HILLSBOROUGH INSURANCE CO.¹ (Supreme Court, New Hampshire, December, 1862.) *Constitutional Law. — Variance. — Alienation. — Amount of Recovery.*

The law of July 7, 1849, ch. 844, authorizes any person who has sustained loss by fire of property insured in any company of New Hampshire to bring his action in any county in which he resides. *Held*, that this controlled an existing limitation in the charter of the defendants, although in it no right to amend, alter, or repeal was reserved.

The policy was issued to S. "and others." The declaration recited the policy to have been made to S., C., M. & B., under the name of S. and others. *Held*, that as there was evidence that C., M. & B. were the parties intended, and were jointly interested in the property, there was no variance.

S. and others having sold the property to W., and S. having received back a mortgage, which transaction was assented to by the president and secretary of the defendants, *held*, that the policy was not avoided, and that the president and secretary would be presumed to have authority to consent to the change.

S. allowed to recover the whole sum insured, though the policy provided that the assured should not be entitled to recover more than two thirds the value of the property; the mortgage exceeding the sum insured and not exceeding two thirds the value of the property.

HARVEY GARCELON vs. HAMPDEN FIRE INSURANCE CO.² (Supreme Court, Maine, Cumberland County, 1862.) *Warranty. — Materiality of Fact.*

The application in this case was made part of the policy and a warranty. The application declared the facts therein stated to be a just, true, and full exposition of all the facts in regard to the risk, "so far as the same are known to the applicant and material to the risk." *Held*, that the warranty did not extend to facts which were unknown to the assured, except to such of these facts as were material.

¹ 44 N. H. 238.

² 50 Maine, 580.

Overvaluation.

The question of the knowledge of the facts and their materiality (the statement being that the building was well ventilated) were properly left to the jury. As to statements made which are not responsive to any inquiry, the burden of proof is on the company to show their materiality and falsity.

Quere, if in such case it is not necessary to prove the statements fraudulent? See 4 Bigelow, 29, 30, note.

MICHAEL WALL vs. HOWARD INSURANCE CO.¹

(Supreme Court, Maine, Cumberland County, 1862.)

Overvaluation.

Verdict for the plaintiff set aside on the ground of "fraud or false swearing," as to the valuation of the property; the plaintiff claiming a loss of \$2,400, and the jury assessing his damages at \$1,060, on a policy for \$2,000.

THE case is stated in the opinion.

DAVIS, J. The plaintiff procured of the defendants a policy of insurance upon his stock of clothing, to the amount of \$2,000. The store occupied by him was destroyed by fire, November 25, 1858. He claimed that the value of his stock on hand at the time was \$2,400; and he commenced a suit upon the policy. The case was tried at the January term, 1860, and resulted in a verdict for the plaintiff, for the amount insured. That verdict was set aside by the full court, on the ground that it was against the evidence. A new trial was had at the October term, 1861, resulting again in a verdict for the plaintiff, for the sum of \$1,060. The counsel for the defendants filed a motion to have that verdict set aside.

There would seem to be the same reason to set aside the second verdict as the first. The evidence was substantially the same. The ground of the defence was, that the amount of the plaintiff's stock was much less than claimed by him. As this appeared to be established by the evidence, the first verdict, for the full amount insured, was set aside.

The amount of the second verdict, exclusive of interest is a little over \$900. If the plaintiff had not *claimed* a greater loss than that, notwithstanding the suspicious circumstances attending it, we might not have disturbed the verdict.

It was the duty of the plaintiff, as soon as possible after the loss, to deliver to the company an account, on oath, of his loss or damage, as particular as the nature of the case admitted, stating

¹ 51 Maine, 32.

Breach of Warranty. — Adjacent Buildings.

the cash value of the property insured. Conditions of Insurance, article 9. This the plaintiff did, the next day after the fire, claiming the value of the goods destroyed to have been \$2,400.

By note 3, to the same article of the conditions annexed to the policy, it is provided that "all fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers on the policy."

The plaintiff made oath to his account, stating the value of the stock destroyed to have been \$2,400. The jury, in their verdict, must have found it to have been about \$900, to which they added the interest after sixty days. If the difference had been less, we might have supposed that it resulted from some mistake, or error of opinion, that would not necessarily involve the plaintiff in any fraud. But when the jury have found that his claim was for nearly three times the actual amount, we are not at liberty to account for it on the ground of error, or mistake. Assuming that the verdict is for the right amount, the inference cannot be avoided that the plaintiff, by rendering on oath a false account, attempted to defraud the insurers, and thereby forfeited all his rights under the policy. Under these circumstances, the verdict must be set aside, and a new trial granted. *Levy v. Baillie*, 7 Bing. 349.

APPLETON, C. J., CUTTING, KENT, WALTON, and DICKERSON, JJ., concurred.

RALPH DAY vs. CONWAY INSURANCE COMPANY.¹

(Supreme Court, Maine, Cumberland County, 1862.)

Breach of Warranty. — Adjacent Buildings.

Construction of the terms of a policy whereby a false description or the omitting to make known any fact or feature in the risk which increases the risk was to render the policy void. The omission to mention a bleach-house separated from the building insured by a wooden shed-roofed building held fatal.

THE case is stated in the opinion.

APPLETON, C. J. The plaintiff effected an insurance on "his wooden four story paper-mill." The insurance was predicated upon the answer of the applicant to certain inquiries, which, by the terms of policy, are made a part thereof, and a "warranty on the part of the assured."

The main building is described in the answer to the fifth ques-

¹ 52 Maine, 60.

Breach of Warranty. — Adjacent Buildings.

tion as made of wood—sixty or seventy feet from above basement—ten feet between floors and ceiled with wood.

It appeared in evidence that there was a bleach-house, adjoining the mill insured, built of brick, which was not called a part of the mill. The bleach-house was built separate and connected with the main building by a shed-roofed building called the salt box. The bleach-house made one wall of it, the mill the other end of it. These had been erected before the application for insurance was made. The bleach-house and salt box have been insured by another company.

The conditions of insurance are made a part of the policy. By the fourth, "a false description by the insured," or "the omitting to make known any fact or feature in the risk which increases the hazard of the same," renders the policy void.

In answer to inquiries proposed, the applicant stated that no building was within three hundred feet, except the stock-house, which was a one story building of wood.

It will be perceived that no mention whatever is made of the bleach-house or salt box in the application, nor in any answer to the questions proposed.

Besides other instructions, the correctness of which it is not material to discuss; the jury were instructed "that it was for them to decide whether the bleach-house and salt box were a part of the mill, and, if so, that their vicinity to the main building did not affect the contract, and was not inconsistent with the answers to the fifth, twenty-seventh, and under the twenty-eighth inquiries in the application."

The risk assumed depended on the building insured, and the purposes for which it was used, and on the number and nearness of the adjacent buildings and the uses to which they were applied. As to all these things the defendants had a right to true answers, and the applicant warranted their truth.

The bleach-house and salt box were either part of the mill or they were not.

If part of the mill, as the jury found they were, then the description of the building insured is materially incorrect in omitting to describe them as part thereof, and the policy by the fourth condition is rendered void.

In *Chase v. Hamilton Ins. Co.* 20 N. Y. 32, *ante*, the application for insurance described the subject of the risk as a stone dwelling-

 Levy on Property.

house, without disclosing the fact that a wooden kitchen was attached thereto; it was held, that the word "dwelling-house" is to be construed as including the kitchen, and the application cannot be deemed one for the insurance only of so much of the building as was of stone. "Although it may be hard upon the plaintiff," observes Grover, J., "thus to lose the benefit of the contract, it would be harder still to hold the defendant bound to insure a dwelling-house composed in part of wood and stone, because it had been proposed to insure a stone dwelling-house." So here, if the bleach-house and salt box are part of the mill, then there is a material variance in the description of the property insured.

If not a part of the mill, then the application is false in stating that there were *no* buildings within three hundred feet, when the bleach-house and salt box were within that distance. That they were not a part of the mill would seem fairly inferable from the fact that they were both insured elsewhere, for parties would be little likely to insure different parts of the same building in different offices.

In either alternative, there was a breach of warranty on the part of the assured.

Exceptions sustained.

CUTTING, DAVIS, KENT, and WALTON, JJ., concurred.

 LYCOMING INSURANCE COMPANY *vs.* SOLUEFFLER.¹ (Supreme Court, Pennsylvania, Philadelphia, 1862.) *Statement of Loss. — Evidence. — Waiver.*

A statement of loss made out by an insured person, under oath, as required by the policy of insurance, is not evidence as to the extent or amount of the loss, in an action against the insurers; nor is it made evidence by the fact that it is called for by the defendant.

An insurance company, after notice of the fire by letter from the insured five or six days after it had occurred, sent an agent to investigate the loss, &c., who was authorized by them to offer a compromise, which he did; another agent, by authority of the company, offered to settle the loss; afterwards, upon the trial, the defence was set up that the notice was not sent "forthwith," as required by the policy. *Held*, that the company had by their acts waived the objection, and were estopped from setting it up on the trial.

 COMMONWEALTH INSURANCE CO. *vs.* BERGER & BUTZ.² (Supreme Court, Pennsylvania, Philadelphia, 1862.) *Levy on Property.*

A clause in a policy of insurance, that it should "cease at and from the time the property hereby insured shall be levied on or taken into possession or custody, under any proceed-

¹ 42 Penn. St. 188.

² 42 Penn. St. 285.

"Building." — Jury. — Particular Statement of Loss. — Waiver, etc.

ing at law or equity," is to be construed as meaning an actual levy and change of possession under it; a mere notice of levy by the officer charged therewith to the defendants at their store, without his taking the goods insured into possession or custody, though good as a levy, will not defeat the policy.

DRAKE vs. FARMERS' UNION INSURANCE Co.¹ (Supreme Court, Pennsylvania, Philadelphia, 1862.) *Notice of Loss. — Waiver.*

The waiver by an insurance company of a written notice of loss by fire, as required by the conditions of a policy of insurance, is a question for the jury.

FRANKLIN FIRE INSURANCE Co. vs. UPDEGRAFF.² (Supreme Court, Pennsylvania, Sunbury, 1862.) *"Building." — Jury. — Particular Statement of Loss. — Waiver. — Other Insurance. — False Swearing.*

It is for the jury to determine as a question of fact from the evidence, whether the merchandise insured was destroyed in the "building" described in the policy; but if a building contain several store-rooms, and there be any uncertainty as to whether all the rooms were intended, it is fatal to the insurers, for the language of the policy is theirs and is to be construed most strongly against them.

Where the insurance company had given permission to the insured to enlarge the "building" in which the merchandise insured was then contained, the same in which it was subsequently burned, and in the permission had mentioned the goods as insured in the building, requiring that no goods should be kept in the second story after the completion of the addition, it is such evidence that the store-rooms of the assured were in the building described in the policy as to justify a submission of the question to the jury.

The jury must determine from the evidence the degree of particularity in the account of the loss sent to the insurance company, the nature of the case admitted of.

A particular statement of the loss may be waived by the company, and if there be any evidence from which such a waiver may be inferred, is for the jury; where the agent of the company had agreed with the assured to ascertain the amount of their loss from the books, and in the answer sent by the company in reply to the statement of the loss, refusing payment "on account of circumstances connected with the insurance," there was no objection to the statement sent, the evidence of waiver was sufficient to justify a submission to the jury.

Though by the policy the assured were required to give notice of all additional insurances made in their behalf, the omission to give notice of an additional insurance not on the same property will not prevent a recovery on the policy after loss.

To create a forfeiture under a clause in the policy declaring that all false swearing or fraud shall cause a forfeiture of all claims against the insurers, the false swearing must be done wilfully and knowingly with a view to defraud the company.

An insurance on "merchandise" such as is usually kept in country stores is not void because hardware, china, and glassware, looking-glasses, &c., were not specifically mentioned, if the articles were such as are usually kept in country stores, which was for the jury to determine. Where a list of items was taken down by counsel from the testimony of a witness on the trial of the same case before arbitrators, the paper containing it cannot be made evidence on the trial by any answer of the witness as to its correctness; nor, where the witness had been called by the defendant, and had stated that at the arbitration he gave a particular account of the items of loss, was it error to refuse to permit the question to be asked by the defendant whether the list then shown to him, as taken down at the arbitration, was a correct statement.

¹ 3 Grant, 325.

² 43 Penn. St. 350.

MILLS vs. INSURANCE CO.¹ (District Court, Philadelphia, 1862.) *Levy on Property.*

A clause in an insurance policy that "the insurance should be void if the property was levied on or taken in custody by the law," is to be construed as meaning rightful levies. Fraudulent intent is a fact for the jury, and when they have found a sale to be lawful, the court should not interfere.

KEELER vs. NIAGARA FIRE INSURANCE CO.² (Supreme Court, Wisconsin, January Term, 1863.) *Pleading. — Alienation between Partners. — Consent.*

An allegation in an action on an insurance policy, that the *property* insured was damaged by fire, is a sufficient averment of damage by fire, sustained by the owner.

Where a policy of insurance is issued to A & B as partners, on property owned by them, containing a provision that if the property be "sold or conveyed without the consent of the insurance company obtained in writing on the policy, it shall be void;" a sale and conveyance of A's interest in the property to his partner B, without such consent avoids the policy, but the forfeiture of the policy occasioned thereby may be waived by the insurance company and the policy continued in force.

Where A & B, as partners, obtained a policy of insurance on their mill, &c., one of the conditions of which was, that if the property insured should "be sold or conveyed without the consent of the insurance company obtained in writing on the policy, it should be void," and A sold and conveyed to B his interest in the property without such consent, and B after his purchase, supposing the policy still to be in force and desiring to assign it to C as security for a debt, in connection with a mortgage he had given him on the property insured, applied to the company for its consent thereto, and informed its agent of his purchase of the interest of A, and the company consented to such assignment, its general agent writing across the face of the policy the words "The loss, if any, to be payable to C, mortgagee." *Held*, 1. That the forfeiture was thereby waived and the policy continued in force.

2. B having applied to the local agent of the company for its consent to such assignment of the policy and stated to him the facts in relation to his purchase from A, but the local agent not having power to give consent applied to the general agent of the company therefor, sending him the policy which was afterwards returned to the local agent for delivery to B, with the words, "The loss, if any, to be payable to C, mortgagee" written across it; such waiver of the forfeiture of the policy is not affected or defeated by the omission of the local agent to inform the general agent of the sale from A to B.

3. A loss having occurred after such assignment of the policy to C, it is no objection to the proofs of the loss, that they were made out in the name of B only, and without showing any assignment of A's interest in the property insured.

4. An assignment of the policy from B, or from A & B to C, was not necessary, after the general agent had written across the policy the words "The loss, if any, to be payable to C, mortgagee."

Where the defence to an action on an insurance policy, is that the insured represented in procuring the policy, that the value of the property was much more than it in fact was; whether there was any misrepresentation as to the value of the property, and if so, whether it was material to the contract, is a question of fact for the jury.

¹ 5 Phila. 28.

² 16 Wisc. 523.

Alterations. — Construction of Lease.

HENEKER vs. BRITISH AMERICA ASSURANCE Co.¹ (Common Pleas, Upper Canada, Hilary Term, 1863.) *Alterations. — Construction of Lease.*

The plaintiff by a policy of assurance in October, 1861, insured against accident by fire with defendants his woollen factory, which was subsequently destroyed by fire, and this action was brought to recover damages under the policy. The declaration averred the performance of conditions precedent entitling plaintiff to bring the action. The second plea stated that after the policy was made alterations and additions were made to the buildings and furnaces introduced, and no notice given of such alterations, &c., and the furnaces were introduced without the knowledge or consent of defendants. To which plea the plaintiff demurred, because it showed no breach of the condition relied on, nor that the risk was increased, nor that the addition was made by plaintiff. *Held*, bad on demurrer, as the introduction of the furnaces is not stated in the plea to have been into the buildings insured, but into one adjacent thereto, and the condition does not relate to the introduction of furnaces, &c., into any other building, and therefore there was no breach of this condition on the plaintiff's part.

The third plea stated that after the insurance (contrary to the condition) divers erections were added to the buildings assured, and that such erections, &c., were within the control of the plaintiff, and the risk was increased without the knowledge and consent of defendants, and no allowance was indorsed on the policy. To which the plaintiff replied by setting forth an additional part of the same condition referred to in the plea, according to which, if the risk was increased by the erection of buildings, or otherwise, it was optional with the defendants to terminate the same. Replication, *held* bad on demurrer, as the erections were made by, and were within the control of the plaintiff, and no notice was given to defendants.

The fifth plea stated that before making the policy, an application and statement was made to defendants, describing the situation of the buildings, &c., and which representation, &c., was material to defendants: and that plaintiff afterwards caused additional buildings to be erected, and made no new representation of such additional buildings, or change of risk. On demurrer, *held*, bad, as it is not incumbent on the assured to make a new representation, &c., during the currency of the policy, and by the condition of the policy referred to in the replication to the third plea, there is a special provision made with respect to change of risk by erection of buildings. On the trial it was shown that the plaintiff had erected a building adjacent to his factory, and placed therein a steam-boiler for the use of his factory, dispensing with and removing out of his main building the stoves, furnaces, &c., therein contained, but no notice was given to the defendants of such erection, removal, &c. The jury gave a verdict for plaintiff, finding that the external risk was increased, and the internal diminished, and on the whole the risk diminished by the alterations, and that the alterations were made within plaintiff's control. On motion to set aside the verdict, on issue on the third plea, *held*, that the plaintiff having made an alteration and increased the external risk, though, in fact, the whole risk might have been diminished, the policy was thereby avoided, and the plaintiff could not recover thereunder.

HENEKER vs. BRITISH AMERICA ASSURANCE Co.

14 Up. Can. C. P. 57.

A new action having been brought on this policy, alleging a total loss by fire, the defendants pleaded a condition of the policy as set out *supra*, on which the judgment, as given in the former case, was adhered to. The defendants further pleaded that the British America Land

Company, of which company the plaintiff is commissioner, had, before the policy, leased the property to one Lomas, who had covenanted to insure and keep insured, and that Lomas, as lessee, made additions to the buildings which increased the risk, and that such increased risk

¹ 13 Up. Can. C. P. 99.

Alterations. — Furnaces.

was within the control of the land company as lessors, whereby the policy was avoided, according to one of the conditions indorsed. *Held*, that these additions, made by a lessee, were not within the control of the lessors. *Held*, also, that the provision in the lease that the lessee should not make alterations

"in the arrangement of the mill or machinery," was not a prohibition from putting up additional buildings; but if it were, the defendants had no right to resist payment of the insurance, because the landlord might have a right of entry for a forfeiture by the tenant.

LOMAS vs. BRITISH AMERICA ASSURANCE CO.¹ (Queen's Bench, Upper Canada, Hilary Term, 1863.) *Alterations. — Furnaces.*

To a declaration on a policy of insurance against fire, subject to certain conditions indorsed, defendants pleaded, first, that these conditions provided that in the assurance of buildings containing any furnace, &c., the construction of the same must be particularly described when effecting the insurance, or if subsequently introduced due notice given to the company, and the same sanctioned; that if after assurance the risk should be increased by any means within the control of the assured, or the premises occupied in any way so as to render the risk more hazardous than at the time of assuring, — unless such alteration or addition should be allowed by indorsement on the policy, — the assurance should be void. And defendants alleged that, after effecting the insurance, the plaintiff made divers alterations and additions to the building, and in such additions introduced two furnaces, of which said furnaces being introduced defendants had no notice or knowledge, whereby the policy became void. *Held*, on demurrer, plea bad; for the condition provided only against furnaces introduced into the building assured, not into additions made to it.

The second plea was, that after the policy, divers erections, which were within plaintiff's control, were added to the buildings insured, whereby the risk was increased, without the defendants' knowledge or consent. To this the plaintiff replied, that by a condition of the policy, in case the risk should be increased by the erection of buildings, &c., it should be optional with the company to terminate the assurance; that the increase of risk was so occasioned, as alleged in the plea, and defendants did not terminate the assurance as provided for in the condition; and that said policy is valid and subsisting. *Held*, that the replication was clearly bad, it being admitted, as stated in the plea, that defendants had no knowledge of the buildings being erected.

The plaintiff also took issue on this and other pleas. At the trial it was proved that an addition had been made, in which a boiler was placed, and steam carried thence into the main building, from which certain furnaces were then removed. The jury gave a verdict for the plaintiff on the second plea, and found that the external risk was increased, the internal risk diminished, and on the whole the risk diminished by the alterations. *Held*, that the plea was proved, and defendants entitled to have a verdict entered for them upon it, on leave reserved.

Thirdly, defendants pleaded, that by another condition all assurances, original or renewed, should be considered as made under the original representation, so far as it might not be varied by any new representation in writing, which in all cases it should be incumbent on the assured to make when the risk had been changed either within itself or by the surrounding or adjacent buildings; and defendants averred that, although after the original representation, new buildings were erected adjacent to and around the buildings insured, and although the risk was changed thereby, yet the plaintiff did not make to defendants any new representation in writing of such new buildings, or of the change of risk, whereby the policy became void.

Per McLEAN, C. J., the plea showed a good defence. Per HAGARTY, J., not, for the change here occurred before the time for renewing the policy, and the condition did not bind the plaintiff to make a new representation until then. *Sillem v. Thornton*, 3 E. & B. 868, dis-

¹ 22 Up. Can. Q. B. 310.

✓ Action. — Renewal. — Occupation of Premises. — Interest. — Estoppel.

tinguished, as the alterations there seemed to have been in progress when the policy was effected.

The decision of the demurrers, however, was necessary only as regarded costs, for the judgment on the second plea determined the action.

SHELDON vs. ATLANTIC FIRE AND MARINE INSURANCE CO.¹
(Court of Appeals, New York, March, 1863.) *Receipt of Premium.*
— *Authority of General Agent.* — *Waiver.*

The rule in marine insurance of the conclusiveness of the acknowledgment of receipt of premium does not apply to fire insurance. *Dicta* to the contrary, in *New York Cent. Ins. Co. v. National Prot. Ins. Co.*, ante; and in *Goit v. National Prot. Ins. Co.*, ante, p. 8, overruled.

The general agent of the defendants assumed to waive the prepayment of the premium. *Held*, that he was authorized so to do; and this, though the policy declared that no insurance, original or continued, should be considered as binding until the actual payment of the premium.

The general agent inclosed the policies in a letter to the plaintiff, saying, "Should you decline the policies, please send them by return mail; if you retain them, please send me the amount, \$29.50." *Held*, a waiver of prepayment.

THOMAS G. HAZARD vs. FRANKLIN MUTUAL FIRE INSURANCE CO.² (Supreme Court, Rhode Island, March Term, 1863.) *Assignment for Benefit of Creditors.* — *Assessments.*

A fire policy taken out from a mutual company by a mortgagor of a house upon his interest in it, though assigned with the assent of the company to the mortgagee, is avoided by the assignment of the mortgagor of all his interest in it for the benefit of his creditors, though made without the assent or knowledge of the mortgagee; the charter providing, that "if the said property [insured] shall be sold or conveyed in whole or any part, then this insurance shall be void and of no effect."

Assessments made and collected upon the premium note of the insured, after the alienation of the premises insured, but in ignorance of such alienation, cannot operate as a waiver of the forfeiture of the policy under the above condition, or estop the company from setting up the alienation in defence to a suit for the loss; but the assessments may be recovered back by the insured under the money counts in his declaration, with interest from the time of payment, as money paid and received by mistake.

NEW ENGLAND FIRE AND MARINE INSURANCE CO. vs. WETMORE *et al.*³

(Supreme Court, Illinois, April Term, 1863.)

Action. — *Renewal.* — *Occupation of Premises* — *Interest.* — *Estoppel.*

An action may be brought in the name of the assignor of a policy (assigned with consent of the underwriter) for the benefit of the assignee, though the former have no interest in the property; and this, too, though a renewal receipt has been executed to the assignee. The usual clause prohibiting the occupation of the premises for the purposes of any trade denominated hazardous in the memorandum of special rates, declaring that "so long as the same shall be so appropriated, applied, or used," the contract shall cease, does not mean that the policy shall be rendered absolutely void by such occupation or use, but

¹ 26 N. Y. 460.

² 7 R. I. 429.

³ 32 Ill. 221.

Action. — Renewal. — Occupation of Premises. — Interest. — Estoppel.

only that its operation shall be suspended for the time; and if no loss occur by reason of such use, the policy revives upon a discontinuance of the danger.

After the underwriter has acknowledged by his acts and conduct the interest of the assignee of a policy, he will not be permitted to deny the same on the trial.

THE case is stated in the opinion.

Mr. Justice BREESE delivered the opinion of the court.

It appears by the record in this case, that one Marvel, on the 5th of November, 1856, executed his notes to one Riggins, and a mortgage to secure their payment on a certain lot in the city of Galesburg, two of which notes and mortgages were, on the 19th of March, 1859, assigned by Riggins to M. A. Wetmore and Charles Long; that George H. Wetmore was the husband of M. A. Wetmore, and, on March 25, 1859, he, with Long, effected a policy of insurance with the appellants on the premises, as "a boarding-house," for one year, against loss by fire, to the amount of nine hundred dollars, their mortgage interest therein. On the 31st of March, 1859, the Wetmores, husband and wife, assigned their interest in the policy to Long, with the assent of the company's agent, having previously, on the 25th of March, assigned and delivered to Long their interest in the notes and mortgage, G. H. Wetmore guaranteeing the payment thereof. In January or February, 1860, Long, with the assent of the company's agent, assigned the policy to Stewart and Scroggs, and delivered the same to them. At the same time, Long assigned and delivered to Stewart and Scroggs the notes and mortgage. It further appears, that on the 17th March, 1860, Stewart and Scroggs paid the agent of appellants a premium on six hundred dollars, for one year, to end on the 17th of March, 1861, for which the agent delivered a receipt called "a renewal receipt," executed in the usual manner.

It further appears that on the night between the 9th and 10th of March, 1861, about midnight, the building on the lot, without any fault of the insured, or of Stewart and Scroggs, was accidentally burnt and entirely consumed. The agent of the appellants was present at the fire, and, on the 18th of March, Stewart and Scroggs gave the agent notice, in writing, of the loss, and on the 29th delivered to him a particular account of the loss, value of the property insured, by whom owned, duly signed and sworn to, and a certificate of the notary public most contiguous to the place of the fire, as required by the conditions of the policy, all which were satisfactory to the appellants. At the time of the

fire and for some time previous, the house was vacant. On the 15th July thereafter, Stewart and Scroggs executed and offered to deliver to appellants' agent an assignment of six hundred dollars of the notes, and mortgage, and decree, with power to collect, which he refused to accept. On the 16th of January, 1862, they executed and delivered to the agent a full and absolute assignment of the notes, mortgage, and decree, with all their right to the same. The arbitrators agreed upon, awarded and determined, before suit was commenced, the amount of loss to be one thousand dollars. The appellants refused to pay, and this action was brought against them, and a judgment recovered for six hundred and thirty-three dollars.

Several objections are made to the recovery in this case ; some of which, and the most material, we propose to notice. It is urged by appellants, that the plaintiffs below had no interest in the property insured, in the policy, or in the renewal receipt, at the time of the fire, and therefore cannot recover in this action.

It is a general principle, that, in a fire policy, the insured must have an interest at the time of the loss. The action was brought on the policy by the Wetmores and Long, to whom the policy was executed, and having assigned it with the assent of the insurers, or their authorized agent, the action is properly brought in their name, there being no provision in the policy, or in the charter or by-laws of the company, authorizing an action in the name of the assignee. This seems to be the form in which such actions are usually brought, that is, in the name of the assured. It is not true to the extent contended for, that the assured must, in every case, have an interest in the property at the time of the loss, for he may have assigned his interest, with the consent of the insurers, to another party, for whose use the suit is brought in the name of the assured. By no act of the assured can his assignee be deprived of his right to the insurance money, which he would be if the assured was bound to show an interest at the time of the loss.

We do not understand that an assignee of an insurance policy can maintain a suit in his own name, unless it is so authorized by the act incorporating the insurance company, or by the general law. At common law, he could not maintain the action in his own name. *Granger v. Howard Ins. Co.* 5 Wend. 202.¹

¹ *Ante*, vol. 1, p. 322.

There are numerous authorities to this point, referred to by appellees' counsel. But had not the plaintiff an interest in the insurance at the time of the loss? The amount of interest or kind is not material, so that it was a subsisting interest. This the plaintiffs had at the time of the loss, as they had indorsed the notes when they assigned their interest in the mortgage, and were responsible on their indorsement, and interested that the insurance money should go to the satisfaction of the notes. To that extent their ultimate liability as assignors of the notes and mortgage was lessened. But on principle, it would seem the fact of the assured having no interest in the insurance at the time of the loss, cannot affect the right of the plaintiffs to sue and recover for the benefit of their assignee. No act of theirs, after an assignment of the policy with the assent of the insurer, can impair the rights of the assignee. *Tillou v. The Kingston Mutual Ins. Co.* 1 Seld. 407.¹

It is also urged that the renewal receipt executed to Stewart and Scroggs was a new and independent contract with them, and if they had an interest in the property at the time it was executed, they must recover, if at all, in their own names.

What is the nature of a renewal receipt like this? It does not contain on its face any agreement, it merely revives an expiring contract and continues it in force another year. The parties to the original contract are not changed by it, nor any substitution of parties, and is only valid and binding, as to rights and obligations, by reference to the policy first issued. This is the only contract of insurance, and a recovery must be had upon that, if a recovery is to be had at all.

In the case of *Herron v. The Peoria Marine & Fire Ins. Co.* 28 Ill. 285, *ante*, which was an action of covenant on a sealed policy of insurance, which had been renewed by a parol receipt, this court held that, under condition thirteen of the policy, which is identical with condition eleven of this policy, the policy continued itself by its own terms, on the payment of the premium and taking a receipt therefor. This is the mode agreed upon by the parties for continuing the policy, and not by executing a new one. The company has received the premium and given the renewal receipt, the effect of which, as they well understood, was to continue the original policy. These receipts are no new con-

¹ *Ante*, vol. 3, p. 238.

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tracts, but merely evidence that the condition of the policy has been complied with by the assured. This disposes of that point.

Another objection made is, that the conditions annexed to the policy and the application are a part of the policy, and the stipulations in it are express warranties, and if the risk is changed the policy is void, and it is not material that the fact complained of did not exist at the time of the fire.

This objection is raised on the fact proved, that for some time previous to the fire, but not when the fire happened, a room attached to the main building had been used as a stable for a horse, and the main building for a saloon in which beer had been sold, and in which a bottle of whiskey was seen. In the application for the insurance, the premises are described as a dwelling-house with some boarders. Now, it is insisted that this description of the premises was an express warranty that the house and premises should not be used, during the existence of the policy, for any other purpose than a dwelling-house or boarding-house. We do not so understand the application. In the case cited from 28 Ill. it was held that the application is a mere representation by the assured, and he is not bound to set it out and prove its truth, but if successfully attacked by the defence, if they can show the representation was false, the assured cannot recover on the policy. What is there, in this contract of insurance, constituting any of the conditions an express warranty? The first condition provides, if after insurance is effected, either by the original policy or by the renewal thereof, such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, or if the risk be increased by any means whatever, within the control of the assured, such insurance shall be void and of no effect.

Stables are special hazards for the insuring of which a higher premium is demanded than of a dwelling or boarding-house, but the proof shows that the fire did not occur whilst the small room was so used. The premises had been vacant some months before the fire, and there is no proof going to show that this use of the room increased the risk, or contributed in the remotest degree to the loss. Had the fire occurred whilst it was used as a stable, then doubtless the policy would have been avoided. The meaning of the condition is, if the house or premises shall be appro-

priated to any prohibited use, then so long as it is so appropriated the policy shall cease to bind the insurers. The New York cases are, we know, all the other way, but we think not with good reason. *Mead v. N. W. Ins. Co.* 3 Seld. 530 ;¹ *Murdock v. Chenango Mutual Ins. Co.* 2 Comst. 210 ;² *Jennings v. Same*, 2 Den. 75.³ These cases hold that the statements in the application, where that is made part of the policy, of the purpose for which the property insured is to be occupied, if untrue, avoids the policy though a different use be not material to the risk.

But what is the contract in the policy on this point? It is in substance as follows: It is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall, at any time after the making of and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special hazards, in the terms and conditions annexed to this policy, or for the purpose of storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous, extra hazardous, or included in the memorandum of special hazards, except herein specially provided for, or hereafter agreed to by this company, in writing, to be added to or indorsed on this policy, then and from thenceforth, *so long as the same shall be so appropriated, applied, or used*, these presents shall cease and be of no force or effect. And it further provides, "that the policy is made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise especially provided for." The import of this language, it seems to us, is most clear, not that this policy shall be absolutely void to all intents and purposes, if the premises are misappropriated, but only while they are so improperly used the insurance shall have no effect. This is apparent from the words we have italicized.

Admit the use was in violation of the first condition annexed to the policy, then the rights and obligations of the respective parties are to be determined by direct reference to all the terms and conditions of the policy, and we see, by the express language of the condition we have quoted, that the policy was to be void

¹ *Ante*, vol. 3, p. 483.² *Ib.* p. 36.³ *Ante*, vol. 2, p. 437.

Action. — Renewal. — Occupation of Premises. — Interest. — Estoppel.

and of no effect, only so long as an improper use of the premises shall exist; when it ceases to exist, then the policy is in full force. This is the view we take of it, and it is in accordance with that of other courts. *Lounsbury v. Protection Ins. Co.* 9 Conn. 456;¹ *Joyce v. Maine Ins. Co.* 45 Maine, 168, *ante*. The same may be said of the whiskey seen in the house, a long time before the fire occurred. Selling that liquor in small quantities to the boarders in the house, or others, will not vitiate the policy, as it is not prohibited by it. Even if it was an unauthorized use of the premises, it had ceased long before the fire.

But the question of increase of risk by such use of the premises was submitted to the jury, and they have by their finding ignored the claim and pretences of the appellants, and believing they have found correctly on this point, we are not disposed to disturb their verdict.

It is also urged that Stewart and Scroggs had no interest in the notes and mortgage at the time of issuing the renewal receipt, and therefore the policy was void.

The proof shows that in January or February, 1860, the assignment was made to them by Long of the policy, with the assent of the agent of the company, and of the notes and mortgage. This made them owners of all those securities, and whilst such owners, on the 17th of March following, the renewal receipt was issued to them, and the premium paid. It is true the assignment in evidence bears date July 7, 1860. The evidence of the notary, J. B. Boggs, establishes a prior agreement between Long and Stewart and Scroggs, about the sale to them, which he thinks was destroyed when this assignment of July 7 was made. Scroggs swore that the assignment and delivery to them of the notes and mortgage was in February, 1860, though the purchase was made in January preceding.

But the appellants have acknowledged, by their own acts and conduct, the interest of Stewart and Scroggs, and cannot now allege against it. They received from them their sworn statement of interest and loss, and acknowledged them throughout all the proceedings as the real parties in interest, never at any time previous questioning their right to pay the premium and receive the renewal receipt. They are recognized as the only parties in interest, by the letters of the president of the company of June 19, and July 17, 1861.

Judgment affirmed.

¹ *Ante* vol. 1, p. 369.

Renewal. — What Policy covers. — Rebuilding.

SAMUEL P. BRADY vs. THE NORTHWESTERN INSURANCE CO.¹

(Supreme Court, Michigan, April Term, 1863.)

Renewal. — What Policy covers. — Rebuilding.

Each renewal of a policy of insurance is a new contract, and is subject to the local laws in force at the time of the renewal.

So *held*, where a policy of insurance of a wood building against fire was made in 1856, and renewed from year to year until 1861, and between its date and the last renewal city ordinances had been adopted, prohibiting the reconstruction or repair of wood buildings within certain limits, including the building insured.

A policy of insurance against fire covers all loss which necessarily follows from the occurrence of a fire, whenever the injury arises directly or immediately from the peril, or necessarily from incidental and surrounding circumstances the operation and influence of which could not be avoided.

A wooden building situated within the fire limits of Detroit was injured by fire, and by the ordinances of that city could not be repaired without the consent of the common council. This consent was refused. The building was insured for \$2,000, and the policy contained a clause that in case of loss or damage to the property it should be optional with the company to rebuild or repair the building within a reasonable time. The cost of repairing the building would be much less than the amount of the insurance, but without leave to repair, the building, which before the fire was worth \$4,000, would now be worth less than \$100. It was *held* that the insured was entitled to recover the whole insurance, and was not limited to such sum as would cover the cost of repair.

The common council of Detroit has power to pass ordinances establishing fire limits, and forbidding the rebuilding or repair of wood buildings within such limits.

Such an ordinance is not to be regarded as a condemnation to the public use of such buildings as have become worthless unless repaired.

ERROR to Oakland Circuit.

The action was brought by Brady upon a policy of insurance for \$2,000, issued January 1, 1856, for one year, and renewed annually thereafter, the last renewal being January 1, 1861. The policy covered a three-story wood warehouse owned by Brady in the city of Detroit. Among the conditions of insurance inserted in the policy was the following: —

“X. In case of any loss or damage to the property insured, it shall be optionable with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within forty days after having received the preliminary proofs of loss required by the third and ninth articles of these conditions, and where no such offer to replace, rebuild, or repair is made, the loss due and ascertained shall be payable in sixty days after receiving such proofs and papers as are required by said third and ninth articles.”

On the trial it was proved on behalf of the plaintiff that the

¹ 11 Mich. 425.

Renewal. — What Policy covers. — Rebuilding.

warehouse took fire February 1, 1861, and the roof was entirely burned. The building before the fire was worth from \$4,000 to \$5,000, and the unconsumed portion was now worth less than \$100.

The plaintiff then proposed to refer to the charter of the city of Detroit, for the years 1855 and 1857; and offered in evidence section 1 of chapter 130 of the ordinances of the common council of the city of Detroit, approved February 15, 1849, as tending to show that the warehouse in question when insured was, and ever since has been, within the fire limits of the city of Detroit, as established by said section 1 of said ordinances; and as tending to show that at the time of the making and renewal of said policy of insurance, and ever since, the ordinances of the common council prohibited the rebuilding, without special leave of the common council, of any wooden building partially destroyed by fire within said fire limits, he offered in evidence the following parts of said ordinances above referred to, which are in the words following:—

“No person shall hereafter erect or place any building or any part of a building within the following limits, unless such building or part of building shall be constructed of stone or brick, with party or fire walls of the same material rising at least ten inches above the roof, if the same be covered with metal or slate; if with wood, then at least two feet, viz. :” here follows a description of fire limits, mentioning the ground covered by the insured premises; and also section 4, viz. : “No person shall raise or elevate from the ground any wooden building now standing within said limits, by constructing thereunder or thereon another story, or in any other way increase the height of said building; and if any persons shall violate the provisions of this section, then he shall forfeit a penalty of fifty dollars, and also a penalty of fifty dollars for each and every week said building shall remain so raised or erected.” Also section 1 of chapter 39; and section 4 of chapter 39 of the ordinances of the common council, approved August 15, 1855, which said section 1 established fire limits, embracing the warehouse in question, and which said section 4 was the same in every respect as section 4 of the ordinances of 1849, previously above quoted. Also sections 1 and 4 of chapter 38 of the ordinances of the common council of said city, approved October 1, 1859, which said section 1 established

fire limits, embracing the warehouse in question, and which said section 4 was as follows: "No person shall repair any wooden building partially destroyed by fire, nor raise or elevate from the ground any wooden building now standing within said limits (fire limits as established by section 1), by constructing thereunder or thereon another story or part of a story, or in any other way increase the height of said buildings, unless he shall have previously obtained permission from the common council to do so, and in no case where the proposed repairs or alterations will increase the fire risk; shall such permission be granted and if any person shall violate the provisions of this section, then he shall forfeit a penalty of fifty dollars for each and every week said building shall remain so raised or erected." To all which and each of which said city ordinances, so sought to be introduced in evidence, the defendants objected, that the ordinances of the common council, and their proceedings thereunder, could have nothing to do with the measure or rule of damages applicable to the contract of the parties, and that the same was wholly irrelevant to the issue between them. The objection thus taken was sustained by the court, and the plaintiff excepted.

The plaintiff at the same time, and in connection with the offer to introduce said ordinances in evidence, likewise offered in evidence the duly authenticated proceedings of the said common council, which were had on the 12th and 19th of February, 1861, tending to show that the plaintiff had applied to said common council for permission to repair said warehouse, and at the suggestion of J. L. Whiting, the agent of said defendants residing in the city of Detroit, and that the said council had denied said plaintiff's request, which testimony was objected to by the defendants for the same reasons as were urged against the admission of the city ordinances, and the objection having been sustained by the court, the plaintiff excepted.

The plaintiff admitted in open court the payment to him of the sum of \$866.50 by the defendants, to apply upon the amount of his damage or loss under the policy, and conceded that another insurance company was responsible for one half of the entire amount of his damages, and thereupon rested.

The defendants then called several witnesses, who were sworn, and testified what sum in their judgment was necessary to restore the building to the condition it was in immediately preceding the fire, and then rested.

The court charged the jury that the rule of damages in the cause was, that the plaintiff should recover such amount as was sufficient to repair the warehouse, and place it in as good condition as it was in at the time when the loss or damage by fire happened, and that a jury could find for the plaintiff only such damage as they were satisfied would be sufficient to have so repaired the premises. That as the plaintiff admitted he had received \$866.50 from the defendants, and as it was conceded that another insurance company was responsible for one half of such damages, the jury could only find for the plaintiff for one half of any additional amount they might from the testimony believe to have been necessary or sufficient for the repairing of the premises insured. The plaintiff excepted to that portion of the charge which instructed the jury that the proper measure of damages was such amount as would be sufficient to rebuild or repair said building.

The defendants having recovered judgment, plaintiff brought error.

MARTIN, C. J. The plaintiff in this case was insured by the defendants in the sum of two thousand dollars, upon his warehouse, on the first day of January, 1856, for one year. The policy of insurance contained, among others, this provision: "This insurance (the risk not being changed) may be continued for such further time as shall be agreed on; the premium therefor being paid and indorsed on this policy, or a receipt given for the same." The obligation of the defendants seems to have been renewed every succeeding year, under this stipulation; and upon such renewed obligation, dating from the first day of January, 1861, this action arises.

Between the years 1856 and 1861 certain ordinances were adopted by the common council of Detroit, for preventing the restoration or reconstruction, within certain boundaries, of wood buildings which might be injured or destroyed by fire. After the passing of these ordinances, the policy was renewed on payment of the premium originally stipulated, and after being countersigned by the resident agent. The question now presented is, whether the liability of the defendant is under the promise of 1856 or that of 1861; in other words, was the undertaking of 1856 made a continuous undertaking, to be construed by the laws and ordinances as they existed in 1856 solely, or, by the renewal,

were the parties bound by the laws and ordinances existing at the time of such renewal?

We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. At the expiration of the year, over which the original policy extended, the obligation of the insurer was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party, and a renewed promise by the other; and an obligation revived or continued under such circumstances is an original obligation. It must be asked for by the one, and may be assumed or refused by the other; and the policy, which is its evidence, is therefore only continued by the positive act of both parties. This is according to the terms of the policy, and of the certificate of renewal; and the fact that the insurance company, by the very terms of the certificate of renewal, required payment therefor, and that such certificate should be countersigned by the resident agent before it should become operative, shows that the company regard the renewal as a new contract, made at their option, and dependent in some degree upon the judgment and knowledge of such agent. Thus, if the agent should find the property depreciated in value, or the risk increased from any cause, he could refuse to countersign the renewal receipt, and the promise by the company to renew the policy would be thereby terminated. Now, it is very clear that all such contracts must be mutual, and that where a right is reserved to a party to renew or dissolve an obligation, the determination of such party to renew an expired contract, if accepted by the other, makes an original contract.

This contract of insurance is one of indemnity against loss by fire; and the whole loss, of which the fire is the *actual* cause, is within its terms to the extent of the indemnity promised. Much is said by judges of the proximate and remote cause of the loss; and the distinction was very elaborately discussed by counsel in the present case. But, after careful consideration, I must confess that, to my mind, the word "*proximate*" is unfortunately used, and serves often to mislead the inquirer, and to produce misapprehension of the real rule of law. That which is the *actual* cause of the loss, whether operating directly, or by putting intervening agencies — the operation of which could not be reasonably

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avoided — in motion, by which the loss is produced, is the cause to which such loss should be attributed. If, in the effort to extinguish fire, property is damaged or destroyed by water, the water may be said to be the *proximate* cause of the injury or destruction; yet in no just sense can it be said to be the *actual* cause. *That was the fire.* The fair and reasonable interpretation of a policy of insurance against loss by fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire, to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided.

Under this rule, what was the plaintiff's loss in the present case? The property insured was situated within the fire limits of Detroit, within which the reconstruction or repair of any wood building injured by fire was prohibited, unless by leave of the common council. The charter and ordinances of the city upon this subject, and the refusal of the common council to permit the repair of the building injured, were offered in evidence to show the extent of the plaintiff's loss, and rejected. This charter and these ordinances were in existence at the time of the last renewal of the policy. They were local laws affecting the property, and the risk which the defendant assumed, and of which the latter is presumed to have had knowledge, and to have estimated in renewing the policy. Whether, therefore, in case of damage or partial loss, the common council would permit a repair of the building, was a risk which the company took upon itself, because the loss and injury to the plaintiff might depend in amount upon such action of the council, while such loss and injury would be absolutely and actually the consequence of the fire, and because by the terms of the policy the company reserved the right to repair or not, at option; thus taking the risk of the power to repair, and of all loss which should accrue if repairing should be impossible from any cause. To hold that for an injury to the property, which results, without the fault of the insured, in a total loss to him, so far as value and use are concerned, the insured can only receive compensation to the extent of the appraised damage to the materials of which the building was constructed, and which were destroyed, would establish a narrow, illiberal, and illogical

rule. The value of the building consisted in its adaptation to use, as well as in the materials of which it consisted; and if it could not be restored to use after the fire, the loss was total, less the value of the materials rescued. In the very pertinent language of the plaintiff's counsel: "The contract was not simply an agreement to pay for so much material as might be damaged by fire, — to pay such amount as the material might actually be worth. Fixed by the conditions of the policy as the most hazardous of all structures, and with a premium adjusted accordingly, the insurer took the risk upon a 'three-story wood warehouse,' actually in use as such. The risk was not taken upon a mere collection of beams, boards, and other materials, thrown together without purpose or special adaptation. It was upon a building for trade, situated in a particular locality, within the jurisdiction of municipal authorities vested with legislative powers for special purposes, and subject to the exercise of those powers;" and the parties must be regarded as contracting with a full knowledge of all the facts and the law, and the risk to which the property was thereby subjected.

Of the power of the common council to pass the ordinances in question, we have no doubt. They contravene no provision of the Constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city. A regulation of the use of property, or a prohibition of its repair when partially destroyed, cannot, to my mind, be regarded as a condemnation to public use.

The court erred in excluding the testimony offered, and in the rule of damages given to the jury.

The judgment is reversed, and a new trial ordered.

MANNING and CHRISTIANCY, JJ., concurred.

CAMPBELL, J. As I do not concur in all the views expressed by the chief justice, and have arrived at a different conclusion upon the validity of the action of the circuit court, I proceed to state the reasons upon which I have formed my opinion.

I concur in holding that if the by-law of the city of Detroit is valid and applicable, the plaintiff should recover on the basis of the claim which he sets up. If that by-law governs the case, he had no right to repair his building without the leave of the common council, which has been refused; and the matter stands, so far as he is concerned, on the same footing as if he had been for-

bidden to repair by an ordinance leaving no room for such permission.

It was claimed on the argument, that where the inability to repair arises from a by-law, such loss, so far as it is thereby enhanced, is caused by the by-law and not by the fire. Some cases were cited which may possibly favor such a construction. In the case of *Devaux v. Salvador*, 4 A. & E. 420, where an insured vessel, in an accidental collision, was injured less than the vessel which she struck, and was obliged by a decree in admiralty to contribute enough to equalize the injuries, it was held by the queen's bench that the loss by reason of this contribution was not a necessary or proximate consequence of the collision, and was due simply to the provisions of law. The American cases cited to the same point hardly go so far as this, and are distinguishable on the facts. I do not propose to refer to the somewhat inconsistent authorities. If, by the very fact of the collision, all these consequences became fixed, I am unable to perceive upon what ground it can be claimed that the collision was not the reasonable cause of all of them. If they were occasioned by subsequent events, they might be too remote and contingent. But if determined absolutely by the collision itself, they must, as it appears to me, stand on the same footing with the other damages, unless, what is possibly the real difficulty in that case, the liability was not supposed to exist except for specific damages to the body of the ship.

The rule applicable to such cases as the present is very well stated in *Irving v. Manning*, the decision of which by the common pleas is reported in 1 C. B. 168, and affirmed by the house of lords in 6 C. B. 391. In that case a ship had been injured, but not destroyed; and it was shown she might be repaired and put in as good order as before, but that when so repaired she would be worth less than the cost of the repairs. She was insured for a much larger sum; and the question was, whether the insured could abandon as for a total loss and recover the full amount, or whether it must be regarded as a partial loss, for which the recovery must be limited to the smaller sum. The case was held to be one of total loss. The opinion of the judges, delivered before the house of lords, places the subject in a very clear light. They remark: "A vessel is totally lost within the meaning of a policy when it becomes of no use or value, as a ship, to the owner, and is as much so as if the vessel had gone to the

bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck ; and the course has been in all cases in modern times to consider the loss as total, where a prudent owner, uninsured, would not have repaired." P. 419.

This rule seems to me very simple, and entirely fair. It is the only rule which can give to the insured the indemnity he bargains for. If for any reason, except a personal one, the repairing of the property would not be undertaken by a prudent owner who was not insured, it would not be reasonable to admeasure damages upon another basis practically false. If repairs are absolutely impossible, the remnants are worth nothing except as lumber. It can in my judgment make no difference why the repairing cannot be done, if an inseparable obstacle exists. Any one such obstacle affects the owner as severely as any other obstacle. Submission to the law is as incumbent as submission to any other necessity, and must be regarded as equally unavoidable.

I am also of opinion, with the chief justice, that the renewal of the policy in controversy was in law a new insurance, and subject to all legal regulations in force at the date of such renewal.

The by-law in question, having been previously enacted, must, if valid, govern the case. I do not, however, regard it as valid.

It appears distinctly that the warehouse insured had been erected for several years before the city charter was amended so as to authorize any interference with repairs to wooden buildings, and before the by-law in question was adopted. It also appears that the value of the injured building, for purposes of repair, was more than half of its value before the burning, and amounted to from \$2,000 to \$3,000 ; while, if not allowed to be repaired, the materials were of very trifling value. The effect of this by-law is to deprive plaintiff of property, in the shape of what is precisely equivalent to an unfinished house worth more than \$2,000.

It is claimed that this by-law, and the provisions of the city charter under which it was adopted, must be regarded as legitimate police regulations, whereby persons are only restrained from applying their property to injurious uses, and that the use of property may be regulated without infringing upon the enjoyment of it for other purposes. It is also claimed that the language of the present charter is only an expression of what was implied in the former one. It does not appear whether the build-

ing in question was erected before or since the first laws which gave the city the power to regulate wooden buildings; and if there has been no real change in these laws, there is no force in the objection.

The present charter allows the city to prevent the "*location or construction*" of wooden buildings, the "*removing*" of such buildings, and the "*rebuilding or repairing*" of the same, within the fire limits which may be adopted. See Charter of Detroit, chap. 4, sec. 22, sub. 35; Laws of 1857, p. 102.

The former charter gave the city power to prohibit any person or persons to "*erect or cause to be erected*" any wooden buildings, "within such parts, streets, or districts of said city as the public safety may require." Act of Feb. 22, 1848, sec. 14; Rev. Charter of 1855, p. 29.

There is no foundation for any claim that these provisions are identical. The erection of a building brings into existence a building which had no existence before; and, if wooden buildings are perilous, creates a peril which never before existed. The repairing of a building neither changes its identity nor increases the peril from what it was before the injury. And, so far as this peril is concerned, it is hardly imaginable that a repaired building can ever be so dangerous as a dilapidated one. But be this as it may, repairing is in no sense the same as "*erecting*," and could not be so construed under the most liberal rules of interpretation.

But these regulations are regarded by the courts as invasions of private privileges, of a character analogous to that of penal laws; and their terms are strictly confined to their literal import. See *Stewart v. Commonwealth*, 10 Watts, 307.

Thus the removal of a building and placing it with proper supports and repairs upon another lot has been held an *erection*. *Brown v. Hunn*, 27 Conn. 332. Erecting an addition to a wooden building, and then putting up a chimney in the old part for the use of the addition, is held not to be the erection of "an addition having in it a chimney or fire place." *Daggett v. State*, 4 Conn. 60. So entirely remodelling a meeting-house or shop, and converting it into a dwelling, is held not to be erecting a dwelling. *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 4 Conn. 68. So, a building of wood partially filled in with brick was held not within a regulation forbidding certain erections of wood. *Stewart v. Commonwealth*, 10 Watts, 307.

This amended provision prevents the owner of a house which has been in the smallest degree damaged, by fire or otherwise, from repairing the building. If unroofed, as in the present case, by fire or wind, and thus rendered untenable until refitted, although it stands as a valuable erection, built before the law, and entirely capable of completion, this law by prohibiting its repair reduces it to all intents and purposes to a mere pile of materials.

The effect of such a provision is to destroy the building for any use whatever, as effectually as if torn down. It is in no sense a regulation of the use of property. So far as the land alone is concerned, it may perhaps be regarded as such a regulation. But the building is quite as much property as the land. Were the city to tear down a house, it could not be said there was no property destroyed. If it were, instead of violently destroying it, to prohibit any one from inhabiting a house at all for any purpose, it is absurd to suppose no right of property is violated. That property, of which our Constitution, following Magna Charta, declares no one shall be deprived without due process of law, does not mean the naked title, but signifies, as Blackstone well remarks, "the free use, enjoyment, and disposal" of it. 1 Bl. Com. 138. Where a highway is laid out over land, it does not in general divest the estate, but no one ever imagined it was not a deprivation of property. The deprivation of the use is the deprivation of the only value which property has; and is not within the power of the legislature, unless the property is wanted for public use, or unless taken under due process of law. While, if public policy requires it, future erections may be regulated within fair and honest limits, those already in existence can neither be actually or constructively destroyed, without violating the rights of private property. As already suggested, the law in question does not regulate the use of an injured building, but utterly destroys its use. This question was somewhat discussed in *Welch v. Stowell*, 2 Doug. (Mich.) 332, where the court animadvert very strongly against the legality of destroying property which was injurious merely from its improper use. The case of *Commonwealth v. Alger*, 7 Cush. 53, which was the strongest case cited on the argument in favor of the power of regulating property by confining it in its uses, expressly declares it illegal to interfere with existing structures. In *Tonawanda Railroad v. Munger*, 5 Denio, 255, and in *Williams v. Michigan Central Railroad Company*, 2

Mich. 259, the use of property was so far regarded as property itself, that it was said to be incompetent for the legislature to authorize cattle to run at large on highways, because the owner of the land was entitled to the pasturage and all other rights, subject only to the public easement. See, also, *Wynhamer v. People*, 13 N. Y. 378; *Brigham v. Edmonds*, 7 Gray, 359; *Stephens v. State*, 2 Pike, 291. I can imagine no principle or semblance of a principle which can justify the entire prevention of the use of any property, under the pretext of regulating its use. And the law now in question appears to me to attempt nothing less than this usurpation of power. It is a prohibition and not a regulation. See *Austin v. Murray*, 16 Pick. 121.

The power of regulating the use of property is not maintainable as an arbitrary one. It has never been held that the legislature had an unlimited discretion in this respect. It must be exercised for some purpose of public safety. And, where the facts do not create the danger, a legislative declaration to the contrary cannot avail. Thus in *Walker v. Board of Public Works*, 16 Ohio, 540, it was held that a law directing a dam to be abated as a nuisance, which was not in fact a nuisance, was invalid. It would be somewhat difficult, in most cases, to show an increase of fire risks from mere repairs to an injured building. Certainly there can be no such universal danger.

I am of opinion, for the reasons I have been compelled to give somewhat hastily, that the city of Detroit has no power to prohibit repairs on the building in question.

I am also of opinion that the by-law is not warranted by the law itself. No by-law is valid which is not reasonable. And I think no by-law is reasonable which does not lay down some rule which will enable persons affected by it to know their rights and liabilities. This by-law does not lay down any rule, of proportion or otherwise, by which any one can determine what amount of injury, or what other circumstances, will preclude repairs. It absolutely prohibits any repairs whatsoever, so far as the mandate goes; but, by qualifying the prohibition by the words "unless he shall have previously obtained permission of the common council," it is left entirely uncertain. I do not doubt that we should presume that body will act fairly, but it seems to me that the law does not contemplate any such flexible and uncertain rules. *Austin v. Murray*, 16 Pick. 121.

Insurable Interest. — Time of Suit. — Policy on Crystal Palace, etc.

I think there was no error in excluding the by-law from the case, and that the judgment should be affirmed.

Judgment reversed and new trial ordered.

NEW YORK BELTING AND PACKING Co., plaintiffs and appellants, *vs.* WASHINGTON FIRE INSURANCE Co.¹ (Superior Court, New York, April, 1863.) *Floors of Building. — Construction.*

The policy (which was upon a two-story factory) stated that there was "water on each floor, with hose, and a watchman is to be kept on the premises at night." *Held*, that evidence was admissible to show that in such buildings the basement and attic were not considered as floors.

MAYOR, ETC., OF NEW YORK, plaintiffs and respondents, *vs.* HAMILTON FIRE INSURANCE Co.²

(Superior Court, New York City, April, 1863.)

Insurable Interest. — Time of Suit. — Policy on Crystal Palace. — Increase of Risk. — "For whom it may concern."

One who owns the soil is presumed to own the buildings thereon. And where the landowner leased to another, at a nominal rent, with permission to erect a building, the lessee to surrender the premises in as good condition as they had been in before, with no reservation of a right to remove the building, *held*, that the landowner had an insurable interest in the building, being the presumed owner.

The clause requiring suit to be brought within a certain time, and that requiring action to be postponed a certain time, must be read together. And therefore where the action was to be brought within six months after loss, and sixty days were to be allowed after adjusting the proofs, *held*, that if the adjustment took so long that the six months expired before the end of the sixty days still to be allowed, the six months' clause must give way to an action brought at the end of the sixty days.

The defendants insured the building known as the Crystal Palace in New York city. *Held*, that as the character of the building, and the use to which it was put as a place for public exhibitions of industries were well known, and as it was described in the policy as the building lately owned by The Association for the Exhibition of the Industry of all Nations, and as the defendants had insured property in it as belonging to exhibitors, the defendants could not object to the use of any of the usual and necessary means for carrying out the purposes of the building.

Goods placed in such a building, for the purpose of exhibition, are not "stored."

What constitutes an increase of risk in such a case, so as to avoid the policy, and what does not.

Plaintiffs effected a policy "for whom it may concern." *Held*, that the policy covered their interest in the building.

BOSWORTH, C. J. This is an action on a policy of insurance made and issued by the defendants, bearing date the 23d of June, 1858, whereby they insured the plaintiffs "for account of whom it may concern, against loss by or damage by fire to the amount of \$5,000, on the iron and glass buildings, known as the

¹ 10 Bosw. 428.

² 10 Bosw. 537.

Crystal Palace, situate on Reservoir Square, between 40th and 42d streets, and the east side of Sixth Avenue, together with the furniture and fixtures now in said building, lately owned by the Association for the Exhibition of the Industry of all Nations, and since vested in John H. White, as receiver, and also such other property lately vested in said White's hands as receiver, belonging to exhibitors, and lately in said White's custody, and now remaining in said building," for one year. The building and its contents were destroyed by fire on the 5th of October, 1858.

The suit is prosecuted by "Mann & Rodman" as plaintiffs' attorneys.

When the cause was open to the jury the defendants "moved to dismiss the complaint, or strike the cause from the calendar, on the ground that the plaintiffs were not legally represented before the court," insisting that all actions on their behalf must be conducted by the counsel to the corporation.

The motion was denied, and the defendants excepted.

When the plaintiffs rested the defendants moved for a nonsuit, on the grounds: First, that the plaintiffs had not shown "any such right to or ownership of the building as will entitle them to recover in this action;" and second, "that this action, not having been commenced until the 16th day of April, 1859, is barred by the last clause of the tenth condition of the policy," which provides that in case any suit be brought "after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." The motion was denied, and the defendants excepted.

These exceptions will be first considered. No law has been cited which deprives the plaintiffs of the right to prosecute any suit by any attorney they may deem it for their interest to employ. As they may sue and be sued, they may appear on the record by any attorney they may choose to employ, and may employ any counsel to try their causes and to argue them on appeal, in whose capacity and fidelity they may see fit to trust. We deem these propositions so clear that any argument in support of them is unnecessary.

Next, in regard to the plaintiffs' insurable interest. They owned the fee of the ground on which the insured building stood, and therefore, presumptively, owned the building also. On the

23d of March, 1852, the plaintiffs leased the land on which the building stood when insured to Edward Riddle, "whereon to erect," and "for the purpose of erecting thereon a building of iron and glass, for the purpose of an Industrial Exhibition of all Nations for the term of five years, if required and used by (said Riddle) for the purpose hereinbefore mentioned for that period at the yearly rent of *one dollar per annum*." It was declared in the lease, that it was made "upon the express condition" that Riddle and his associates would erect the building, and at the expiration of the term should "quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted."

On the 31st of March, 1852, Riddle, by a written and sealed instrument, sold, assigned, and transferred to the "Association for the Exhibition of the Industry of all Nations" the said lease, the premises therein mentioned, and the buildings thereon, for and during the rest and residue of the term. The erection of the building was commenced in January, 1852, and it was opened about the first of July, 1853. The building covered an area of three acres; the lease expired in 1857; the plaintiffs took possession of the property on the 31st of May, 1858, and were in possession when the policy was issued; and the defendants then knew that they were in possession.

We think that by the true construction of the lease, the building was to become the property of the corporation when the lease expired. It was only on the condition that the building should be erected that the lease was granted at the annual rent of one dollar per annum. The resolution of the common council, authorizing the lease, was passed on the strength of the fact that they (Riddle and his associates) commenced digging and getting ready for the building in January, 1852.

By the terms of the lease, Riddle and his associates were to fix the price of admission to the building at a sum not exceeding fifty cents for each individual, and these receipts were for their use and benefit, and it was undoubtedly anticipated that they would amount to a very great sum. The covenant to surrender the premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, would seem to imply that the building was to be surrendered in

that condition. The words, the "wear thereof," and "damages by the elements excepted," do not appear to be capable of application to the land itself.

If it be a correct view that by the fair meaning of the lease the building was to be the property of the plaintiffs, then all objections to evidence as to whether it was so constructed that it could be taken down and removed are untenable. The evidence was wholly immaterial, and could not possibly have prejudiced the defendants, as to their other grounds of defence. These views also dispose of the first four requests to charge. The plaintiffs owning the building and the land on which it stands, it is immaterial, in reference to their right to recover on this policy, whether they obtained possession by suit at law, or in the way they did.

Next, as to the objection that this suit was not commenced within six months after the loss.

The loss occurred on the 5th of October, 1858, and the six months expired April 5, 1859. This suit was commenced April 16, 1859. The eleventh condition of the policy declares that "Payment of losses shall be made in sixty days from *the date of the adjustment of the preliminary proofs of loss by the parties.*" It therefore becomes material to ascertain when the preliminary proofs of loss were adjusted by the parties. There would be no right of action until the expiration of sixty days from the date of such adjustment. The tenth and eleventh conditions must be so construed as not to conflict unnecessarily with each other. And where the parties, in good faith, and without any objection that unnecessary time is taken for the purpose, are occupied so long in adjusting proofs, that sixty days from the date of adjustment will not expire within the six months, the policy does not become forfeited merely because a suit is not brought within the six months, and before the loss is payable. To such a suit, the answer that the money was not due when it was commenced, would be perfect.

The preliminary proofs were served November 30, 1858. Objections thereto, by the defendants, were served January 8, 1859. It was not stated, among such objections, that the preliminary proofs had not been served in due time.

Amended proofs were served on the defendants, February 12, 1859, and they served further objections thereto on the 18th of

February, 1859. Up to this time, the preliminary proofs had not been adjusted by the parties. This suit was commenced within sixty days from this time, viz. April 16, 1859.

It would seem to be a fair view of the eleventh condition of the policy, and of the acts of the parties under it, that the plaintiffs had the right, in good faith, to examine these last objections, and if further amendments were required to make and serve them. If the plaintiffs, after this, had served further proofs, which were satisfactory to the company, the right of action would not have accrued until after sixty days from such service; and this case, in this respect, is substantially like *Ames v. The New York Union Ins. Co.* 4 Kern. 253, *ante*.

In that case it was provided that the loss was "to be paid within ninety days after due proofs of loss, amended and completed, should have been filed in the office of the company, in compliance with the terms and conditions of the insurance;" *Ib.* 254; and the policy required a suit to be brought within six months after the loss. *Ib.* 255. The building was destroyed July 5, and proofs were served on the 14th of that month. On the 7th of October, objections were made to the proofs, and on the 14th of that month an affidavit was served to meet the objection. The action was commenced on the 18th of January, 1854. *Ib.* 256. The company was applied to for payment January 2, 1854; it was then stated that it would not be due until the 14th, and the person applying was directed to tell the plaintiff it would be paid when it was due. *Ib.* 258, 259.

In that case payment was applied for within six months after the loss, and within ninety days after the adjustment of proofs. The answer made to that application was held to be a waiver of a right to insist on a suit being brought before the day on which the company's officers stated the loss would be payable, viz. January 14th, which was nine days after the six months expired, and the ninety-first day succeeding that on which the proofs were adjusted.

In this case there was no demand of payment proved to have been made. The complaint states that the company refused to pay the loss, which the answer does not deny; but the complaint does not state when the refusal was made. But if the proofs are not to be deemed to have been adjusted by the parties until after the objections served by the defendants on the 18th of Feb-

ruary, and a reasonable time to examine them, or even if they are to be deemed to have been adjusted on the 12th of February, 1859, although further objections were served on the 18th, for the reasons that the further proofs served February 12, 1859, should have been accepted as sufficient, and are not now objected to as insufficient, then the loss would not be payable until April 12th, which was more than six months after the fire. From the 12th of February there were but sixteen days in that month, and thirty-one in March and thirteen in April would be required to make the sixty days.

The principle of *Ames v. The N. Y. Union Ins. Co.*, *supra*, covers this point in the case, and the reasoning of the court, in its opinion, discusses this precise state of facts, and declares that the objection now under consideration is untenable. It now remains to consider the question arising on exceptions to the admission and rejection of evidence, to refusals to charge as requested, and to the charge made.

The policy, in the body of it, contains these provisions, viz. :—

“And it is agreed and declared to be the true intent and meaning of the parties hereto that in case the above mentioned premises shall, at any time after the making, and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated *hazardous or extra hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, or for the purpose either of storing, depositing, or keeping therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, except as herein specially provided for, or hereinafter agreed to by this corporation in writing, to be added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease, and be of no force or effect.*” “And that this policy is made and accepted in reference to the *terms and conditions* hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, *in all cases not herein otherwise specially provided for.*”

The conditions annexed to the policy declare that “if, after

insurance effected, either by original policy or by the renewal thereof, the risk shall be increased within the control of the assured ; or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect."

The following trades and occupations, goods, wares, and merchandise (as the policy declares), are deemed *hazardous*, viz.: "spirituous liquors, cigars."

"The memorandum of special hazards" enumerates "*bakers, steam-engines in use, theatres and other places of public exhibition, all trades and occupations requiring fire heat not before enumerated.*"

It was proved that the building was erected for the purpose of exhibiting the industry of all nations, and was opened about the first of July, 1853. The opening of it, as is well known, was a matter of public notoriety, and was attended with much ceremony. The American Institute held its annual fair in this building in 1855, 1856, 1857, and 1858 ; and in each year was largely attended. All that it had in the building was "on exhibition, with the exception of the blacksmith's fire, for repairing the building ;" and the forge for blacksmithing in making repairs was "a portable forge."

The plaintiffs, after they took possession of the building, by a lease dated June 25, 1858, leased the premises to the American Institute for one year from the 1st of June, 1858. After the American Institute took possession, they introduced into the premises "two portable engines and one horizontal pressure engine of about fifty horse power," but "no new boiler." No new shafting was put in that year. The portable engines were used for "bread mixing and baking." The American Institute leased the restaurant to John R. Treadwell, who had conducted it for several years, and who immediately commenced fitting up his rooms for the same purposes and uses for which he had occupied it in the preceding years. He kept a general assortment of liquors and cigars, and had a kitchen, where he cooked all kinds of victuals, and baked biscuit and rolls ; substituting an oven for another he had the previous year, which did not bake fast enough. The restaurant had no entrance independent of that for visitors to the fair, and their custom was that relied upon. The restaurant was opened with the fair, and closed when that was ended.

The fair of the American Institute usually opened about the middle of September, and closed about the first of November. It did not keep the building open as a place of exhibition after the fair was closed. This was so in 1856 and 1857. In 1858 the Institute had on its catalogue of articles for exhibition, a little rising of 4,000 in number, about the same in 1857, and the number varied but a few hundred in 1856.

But the building was kept open daily from the close of the fair, from about eight A. M. until sunset, and this use was continued from the close of the fair in 1857. During this period "there were three or four steam-engines in the building to be tested, and they fired up several times."

There can be no controversy that all the articles, machinery, &c., which were in the building, and all the use made of fire heat or steam, were "as parts of the exhibition," except the portable blacksmith's forge "for repairing the building."

When underwriters insure property stated to be used in a designated business, they are deemed to be "acquainted with the business and with the materials ordinarily and necessarily used by the trade in prosecuting it. In issuing the policy, they must be deemed to have intended to have included all such materials in the risk." *Harper v. The Albany Mut. Ins. Co.* 17 N. Y. R. 197, 198, *ante*.

In the present case, the defendants insured a building, which, and the use to which it was devoted, were matters of public notoriety, and excited great public interest and attention. It was the only thing of the kind on this continent, and was located in the same city with the defendants. They insured the building, its furniture, and fixtures, describing the building as the one lately owned by "The Association for the Exhibition of the Industry of all Nations," and also insured other property then in said building as "*belonging to exhibitors.*" The building had been used as a place of exhibition since July, 1853. The American Institute had regularly held its annual fair in this building, in each of the years 1855, 1856, and 1857, and in 1858, when the fire occurred, was also holding its annual fair for that year. The building had not ever been used for any purpose except for such exhibitions.

The defendants must, therefore, be deemed to have been acquainted, when they issued the policy, with the business or use

to which it was appropriated, and with the nature of the objects exhibited, and the means employed to exhibit the various articles shown at the fair, and to have intended to include such business and use, and the employment of all such usual means in the risk. *Harper v. The Albany Mut. Ins. Co.*, *supra*; *Delonguemare v. The Tradesman's Ins. Co.* 2 Hall, 589, 620,¹ approved in 17 N. Y. R. 197.

The judge charged that the defendants insured the building "to be used and applied for purposes that may have been hazardous and extra hazardous within the meaning of the conditions annexed to the policy, to the extent to which it had been previously applied for the same purpose." That "this policy was an insurance on this palace as a place of exhibition to be employed and used as previously used."

The accuracy of these propositions is supported by the two cases last cited, and by *Lounsbury v. Protection Ins. Co.* 8 Conn. 459; ² *Grant v. Howard Ins. Co.* 5 Hill, 10.³

These views answer the eleventh request to charge, and also the twelfth, in so far as it involves a use like that previously made of the building.

With respect to the fifth and sixth requests to charge, it is important to notice that there was no evidence that "any trade, business, or vocation" was carried on in the building, otherwise than as part of the exhibition of the articles placed there to be exhibited; nor was there any evidence that the building was used "for the purpose of storing or keeping therein" any article which, in the conditions of the policy, was denominated hazardous or extra hazardous, or which was included in the memorandum of special rates. All the articles there were articles to be exhibited, or to be used as means and instruments of exhibiting the products on exhibition.

There was no storing or keeping of any article which was there, within the meaning of those words in policies of insurance, as expounded by judicial decisions. *Hynds v. The Schenectady County Mut. Ins. Co.* 1 Kern. 554.⁴

The charge of the judge in respect to the matter of these two requests was correct, and his statement, that "there does not appear to have been any storing of such articles which was not

¹ *Ante*, vol. 1, p. 289.

² *Ib.* p. 369.

³ *Ante*, vol. 2, p. 266.

⁴ *Ante*, vol. 3, p. 773.

essentially connected with the exhibition itself," was in strict accordance with the testimony.

The seventh request was, that "if the jury believed that after the insurance was effected the risk was increased by any means whatever within the control of the plaintiffs, then the insurance was void, and the plaintiffs cannot recover."

The eighth was, that if "the building was so occupied so as to render the risk more hazardous at the time of the fire, the insurance was void, and the plaintiffs cannot recover."

The judge charged that the building was a place of exhibition, and that it might be subsequently applied to the purposes to which it had been previously applied. "If, subsequent to that (that is, subsequent to the time the American Institute took possession), there is found anything in the evidence to make it appear that the purposes of the application of this building were more hazardous than those so stipulated for in the policy, then the policy should be suspended during such application; but if the plaintiffs only continued the same kind of employment as before, then the insurers are responsible."

"To these instructions the defendants duly excepted."

The exception to this part of the charge covers the matter of two sentences, and each and all of the propositions embraced therein. The first sentence is in these words, viz.: "I shall, therefore, instruct you that it was a place of exhibition, and you are to take the purposes to which it was previously applied as the purposes for which it was to be applied afterwards." This proposition is sound, if the views already expressed are correct. The exception being to this, as well as to two other distinct propositions, it is not well taken, and it is not necessary to consider the other two propositions, with a view to determine whether both or either of them is erroneous. 1 Seld. 422; 3 Ib. 266.

The part of the charge next following which is excepted to, and which relates to the same subject matter, contains six separate sentences, and as many distinct propositions. The observations in respect to the considerations last considered are applicable to this.

To make it erroneous not to have instructed the jury that the policy was void, in either of the two events described, in the seventh and eighth requests to charge, and make it erroneous to merely charge, in answer to such requests, that the policy would

be suspended during the continuance of such increased risk and more hazardous occupation, the requests should have been accompanied with a qualification.

The body of the policy, in express terms, provides that an increased risk or more hazardous occupation, if it arises from appropriating, applying, or using the premises "to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates," &c., "or for the purpose either of storing, depositing, or keeping therein any of the articles, goods, or merchandise," so denominated or specified, shall only suspend the operation of the policy during such appropriation, application, or use.

The increase of risk or more hazardous occupation which makes the policy void must arise from causes other than those which the body of the policy declares shall suspend its operation, and from those only; for the latter class of contingencies is provided for in the body of the policy, and by the terms of that, the conditions annexed to the policy "are to be used and resorted to in order to explain the rights and obligations of the parties hereto, *in all cases not herein otherwise specially provided for.*"

The matters referred to in the seventh and eighth requests to charge, as being sufficient to render the policy void, are described in the conditions annexed to the policy, and must, therefore, be something other than those matters which the body of the policy declares shall have suspended its operation and only that.

The seventh request, to be strictly accurate, should have been, "That if the jury believe that, after the insurance was effected, the risk was increased by any means whatever within the control of the plaintiffs (other than those fairly involved in a use of the palace as a place of exhibition, as it had been previously used and employed), then the insurance was void, and the plaintiffs cannot recover."

It may be quite clear that, subsequent to issuing the policy, the risk was increased by introducing articles belonging to the American Institute and exhibiting them. It may be also clear that the use was substantially the same in all particulars, as in every previous year, from the time the building was erected. Such facts would not entitle the defendants to a charge, in the broad terms of either the seventh or eighth requests.

So, also, the risk may have been increased and the occupation have been such as to render the risk more hazardous than it was on the day the policy was issued, but if this increased risk was caused by using the premises for a business within the contemplation of the parties and covered by the policy, it was right to refuse to charge as requested.

So, too, if the increased risk arose from any of the causes which, by the policy itself, were only to suspend its operations while such causes continued, it was right to refuse to charge as requested. These requests, therefore, are too broad, and should have been presented in a modified form, to have made them strictly accurate.

But I think it quite clear, from the points of the appellants (the appeal having been submitted on printed points, and not argued orally), that no such distinction was in the mind or intent of the counsel, in presenting his seventh and eighth requests, as that some of the acts of which he complained, and to which he called the attention of the court, would make the policy void, while others might possibly only suspend its operation.

The burden of his points is, that this policy was not an insurance on this palace as a place of exhibition, and that its general use as such, and various specified acts which were done in, and as parts of such use, constituted a bar to the plaintiffs' right to recover.

There is no statement in the printed points, which refers in terms to the seventh or eighth request to charge. It cannot, therefore, be now said that the defendants make a point that they were not charged in the form of the requests themselves; and this omission to refer to them renders it quite evident that the defendants were not understood at the trial, and did not then intend to have it understood by the court, that those requests, in stating the matters which, if found by the jury, they insisted would make the policy void, referred to an increase of risk from causes other than those which, the policy itself declares, would suspend its operation.

This will be made quite evident by a brief analysis of the appellants' points.

In their specification of the facts claimed to have been proved, and which are relied upon as sufficient to defeat a recovery, they state that "It was also proved that the American Institute, for

the purposes of its exhibition, had introduced into the insured premises many articles, and exercised therein several kinds of business, which, in the conditions annexed to the policy, were denominated hazardous, extra hazardous, and special hazards, such as glass-blowing, baking, restaurants for sale of liquors and cigars, with kitchens for cooking, acids, forge for repairing, burning fluid, gas manufacturing, steam-engines, a panorama, &c., &c.; all of which articles were not in the building when the policy was executed, but were in it when the fire occurred, and had been for about a month."

The first point is, that "the court erred in admitting evidence . . . to show the manner in which the building had been used previous to issuing the policy." And the second is, that "the court erred in admitting the opinion of an incompetent witness to prove . . . that the building could not be taken down."

The other eight points (exclusive of the argument in support of them) are as follows, viz. : —

"III. The court erred in charging the jury that the legal interpretation of this policy was, 'that this was an insuring of this building to be used and applied for purposes that may have been hazardous or extra hazardous within the meaning of the conditions annexed, to the extent which it had been previously applied for the same purpose.' 'Fol. 293.'

"IV. The court erred in charging the jury that 'this policy was an insurance upon this palace as a place of exhibition to be employed and used as previously used.' 'Fol. 296.'

"V. The court erred in instructing the jury that 'substantially it was continued as a place of exhibition at the time this policy of insurance was made upon the building, because the period between the time that the previous society had ceased to run the machinery and its occupation by the American Fair in 1857, and the period between when it was taken possession of by the plaintiffs, was not sufficient to destroy its character as a place of exhibition.'

"We submit that it cannot be said fairly that this was a place of exhibition at the time this policy was made.

"VI. The court erred in not charging the jury as requested at fol. 277, being the fifth request; and also in charging 'that there did not appear to have been any trade, business, or occupation carried on there at any time.'

"VII. The court erred in not charging the jury as requested at fol. 278, being the sixth request; and also in charging that there did not appear to have been any storing of hazardous articles therein which was not essentially connected with the exhibition itself. Fol. 302.

"VIII. The court erred in not charging the jury as requested at fols. 282 and 283, being the twelfth request; and in charging the jury as set forth at fol. 300.

"IX. The court erred in not granting the motion to dismiss the complaint upon the second ground as stated at fol. 176, being the thirteenth request, and also in charging the jury as stated at fols. 302 and 303.

"X. The court erred in charging the jury that the plaintiffs were entitled to recover as stated at fol. 305."

These points are prepared under a rule of court which requires the appellant to furnish "to each of the judges . . . a printed copy of the points on which he intends to rely." S. C. Rules, No. 43.

These points do not bring the fact of the making of the seventh or eighth requests to charge to the attention of the court, nor do they allude to any exception taken for refusing to charge either of them, which is a virtual waiver of the last named exception.

The points, on the other hand, discuss the exceptions to the portion of the charge which covers the matter of these requests, and thus the appellants signify to the court, that they rely on the supposed errors which such exceptions were designed to reach.

The appellants, therefore, are not entitled, on any principle, to a new trial by reason of the refusal of the court to charge in the terms of the seventh or eighth request.

There can be no pretence that anything new was introduced, not introduced in previous exhibitions, beyond, possibly, a slight increase of the number of articles entered for exhibition, except the portable forge for making repairs, the two portable engines, the horizontal engine, and the altering of the oven in the restaurant.

That the introduction of the portable forge for repairs did not vitiate the policy is, I think, well settled. *Lounsbury v. Protection Ins. Co.*, *supra*; *Delonguemare v. Tradesman's Ins. Co.*, *supra*; *Dobson v. Sotheby*, 1 Mood. & Mal. 90; ¹ *Shaw v. Robberds*,

¹ *Ante*, vol 1, p. 199.

6 Ad. & El. 75;¹ *O'Neil v. The Buffalo Fire Ins. Co.* 3 Comst. 122.²

The alteration of the oven, without proof that its use in its altered condition would increase the risk, is not material. *Barrett v. Jermy*, 3 Ex. R. 535.³ No evidence of that character was attempted to be given.

The two portable engines exhibited (in their use) bread mixing and bread baking, as a part of the exhibition. What was done with the horizontal engine does not very clearly appear; but it does appear that it "was supplied with steam from the main boiler; no new boiler was introduced for it."

There is nothing in the proofs in regard to either of these four matters, or all of them combined, or their use, which would justify a verdict for the defendants.

It would seem to follow, if the views already stated are correct, that, in any fair view of the evidence, the plaintiffs were entitled to a verdict.

The building was insured to be used for the purposes for which it had always been used, and as previously used; and it has not been used otherwise, or for any other purpose.

The only new things introduced were either for repairing the building, or for exhibiting the articles entered for exhibition.

We think there is nothing in the ninth request requiring any comment.

The plaintiffs were insured, "for account of whom it may concern." The obvious reason is that, among other things, property belonging to exhibitors, whose names were unknown, was also insured. Possibly, also, for the reason that the receiver, as well as the plaintiffs, claimed property in the building. But that the plaintiffs claimed ownership, and at the time intended the policy should protect their interest, there cannot be any doubt.

On such a state of facts the policy covers their interest. 1 Phillips, §§ 383, 389. The judgment should be affirmed.

ROBERTSON, J. The learned chief justice has so fully and ably discussed and disposed of all the points urged before the court in this case, that nothing further is needed to justify his conclusions. I only propose to add a few considerations in reference to the eighth and ninth requests to charge, on behalf of the defendants. Of course that part of the charge which refers to a suspension of

¹ *Ante*, vol. 1, p. 621.

² *Ante*, vol. 3, p. 103.

³ *Ib.* p. 6.

the policy, while the building was applied to purposes more hazardous than those stipulated for in it, was not entirely responsive to the propositions in both those requests. They involved, substantially, these propositions, that the insurance was void if the risk was increased by any means within the plaintiffs' control, or if the building was occupied so as to render the risk more hazardous at the time of the fire. In reference to the last of those requests, perhaps it was immaterial, because not injurious to the defendants, whether the court charged that the occupation of the building at the time of the fire avoided the policy, or that the application of it to extra hazardous purposes suspended the policy during such application, the substantial part of both being that the policy was not obligatory, if at the time of the fire the hazard of the employment of the building had been increased. But I apprehend there are two sufficient justifications for refusing both requests, which are: 1st. Their generality,—being without any qualification as to the nature of the risk; and 2d. The absence of any evidence to prove any increase of risk beyond that stipulated in the written part of the policy to be assumed by the defendants.

One of the printed conditions attached to the policy provides that "if the risk be increased within the control of the assured, or the building be occupied to render the risk more hazardous than at the time of insuring," the insurance shall be void. This is immediately followed by another, that "*if the risk be increased by the erection of buildings, or the use or occupation of neighboring premises, or otherwise, . . . it shall be optional with the company to terminate the insurance after notice.*" Whether the effect of the word "*otherwise*" in that latter clause changes the effect of the word "*void*" into voidability upon notice, is not material. The clauses taken together show that what is meant by the word "*risk*," is danger by the perils insured against. The body of the policy provides for a suspension of its activity in two different contingencies. 1st. During the application of the premises insured to carrying on any business denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the conditions annexed thereto. 2d. During the storage therein of any articles denominated in such conditions hazardous or extra hazardous, or included in the memorandum of special rates, except as therein specially provided for. It also contains another clause, that the conditions thereto annexed are "*to be resorted to in order*

to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for." It appears to me, therefore, very plain, that on the face of the contract, the conditions annexed are not to define the rights and obligations of the parties, under any contingency provided for in the body of the policy. In other words, that the instrument of insurance is not to become void by any increase of risk under the control of the assured, or the occupation of the building, so as to render the risk more hazardous, provided the same arise from the application of the building to any of the hazardous, extra hazardous, or special occupations mentioned in the memorandum annexed, or the storing therein of any of the articles designated as hazardous, extra hazardous, or special, therein, but that in such case the operation of the policy is to be thereby suspended while such increase of risk continues, in consequence of such application or storage. Among the articles designated as specially hazardous are "*steam-engines in use,*" and every article deposited on these premises is to be found in the list of articles annexed to the policy. It is very evident that the conditions were intended to be the last resort to cover by general phrases all increase of danger not provided for in the policy, and only such.

To have made these requests in proper form, they should have been that the policy was void in case the risk was increased by any means under the plaintiffs' control, or by any occupation of the building for uses or by articles not included in those denominated hazardous, extra hazardous, or specified in the memorandum of special rates annexed; but in case such increase arose from those articles or occupations the operation of the policy was only suspended.

But there is another qualification equally material which should have been added to such requests. The written controls the printed part of the policy, and the body of the contract excepts from the operation of the annexed conditions anything therein specially provided for. It was held, on the trial, that the description of the premises in the written part of the policy ratified their appropriation to the use to which they had been theretofore applied, and which was included in such description. In that view I feel gratified in being substantially sustained by the learned chief justice. If that be so, no mere positive increase of risk would be sufficient to avoid the policy, unless it arose from something else than the appropriation of the building to

uses similar to that to which it had been previously appropriated. Possibly the introduction of new steam-engines, and working them, or a bar and its fixtures, might have increased the risk, from what it was at the time of the insurance; but if they were the proper appendages of a plan of exhibition of the mechanical, industrial, and fine arts and their products, they were no increase of the perils stipulated to be assumed. The requests, in the absolute form in which they were put, were properly disregarded. And this was one of the grounds upon which such requests were refused, and properly, as I still think.

The instruction, as to a suspension of the policy, was joined with two others, and an exception taken to the whole, jointly. The first was, that the purposes to which the premises had been applied were to be the purposes to which it might be applied; then followed the direction that if the purposes of their application were more hazardous than those so stipulated for, the policy should be suspended, but if the plaintiffs continued only the same kind of employment as before, the defendants were liable. The first and last were clearly right upon the principles already laid down, and the general exception to the three was therefore untenable. It will be found that this instruction was intended to apply to the clause in the body of the contract, referring to the suspension of the policy, and not to the clause in the conditions making it void. That had already been disposed of by the instruction that if the premises had been used for storing extra hazardous articles, it would be fatal to a recovery, unless by the terms of policy such a restriction had been made inapplicable, which is followed by the interpretation of the contract already referred to. Moreover, no harm ensued to the defendants from charging such matter in their favor, however erroneously. And if there was no evidence to sustain the charge of an increase of risk by a devotion of the building to other purposes than those whose perils were assumed, the instruction as to the suspension of the policy was wholly irrelevant and harmless.

But, in addition, even if the legal principles included in the propositions contained in such requests were rightly laid down, without the qualifications already mentioned, the evidence (as I think is demonstrated in the opinion of the chief justice) shows that there was no increase of risk beyond that arising from the continuation of the application of the building to the same uses as before. Upon a charge given in the form so requested, the

Foreign Companies.

jury might have been warranted in finding that the repairing forge, portable and horizontal engines, and the repairs to the oven, increased the risk existing at the time of the insurance; but if they also found that the introduction and use of such articles belonged to a place of exhibition of arts and products, I apprehend the first finding would be rejected as immaterial.

There is, therefore, no error in any material part of the charge, or the refusal to charge; the only criticism to which it is possibly amenable is the superfluity that a suspension of the policy would take place in case of an application to more hazardous uses than those stipulated, and that seems fully borne out by the clause in the body of the policy and the memorandum annexed.

I concur in affirming the judgment and refusing to grant a new trial, and allowing judgment to be entered on the verdict for the plaintiff, with the costs of the cause and the argument of the exceptions to be adjusted.

BARBOUR, J., concurred in affirming the judgment.

Judgment affirmed.

BYRNE vs. RISEING SUN INSURANCE CO.¹ (Supreme Court, Indiana, May Term, 1863.) *Waiver.—Certificate of Loss.*

In an action upon a policy of insurance, one of the conditions of which requires the assured to procure a certificate of the nearest magistrate or notary public, of the loss, &c., and it appears that a proper certificate of such an officer was delivered to the agent of the company, in March, and that another such officer resided nearer to the scene of the fire than the one who made the certificate, but the agent made no objection to the certificate on that account at the time it was delivered to him, nor at any time thereafter, until the trial of this action, in the following October, and it was then shown on such trial that there was a promise to pay the loss by the agent, it should be held that the company had waived the defect, if any, in said certificate.

RISEING SUN INSURANCE CO. vs. SLAUGHTER *et al.*² (Supreme Court, Indiana, May Term, 1863.) *Foreign Companies.*

The Act of June 17, 1852 (1 G. & H. p. 272), on the subject of the conduct of foreign corporations and their agents in this state, embraces foreign insurance companies; and a policy of insurance, negotiated in this state by a foreign insurance company or its agent, without a previous compliance with the requirements of that act, is void.

And the negotiation of such a void policy with such foreign company, upon property hitherto insured in a domestic company, by a policy conditioned to be void "if any prior or subsequent insurance is made without the consent of the company being indorsed thereon," would not amount to a breach of such condition, or avoid the domestic policy.

In an action upon a policy of insurance, the averment that the company "insured the plaintiff to the amount of \$3,000, on 10,000 bushels of oats," &c., sufficiently shows an insurable interest in the plaintiff.

¹ 20 Ind. 103.

² 20 Ind. 520.

Preliminary Proofs. — Alienation. — Mortgage.

ALONZO VAN DEUSEN, plaintiff and respondent, *vs.* CHARTER OAK FIRE & MARINE INSURANCE CO.¹

(Superior Court, New York City, May, 1863.)

Preliminary Proofs. — Alienation. — Mortgage.

The non-production of part of the preliminary proofs is waived by a failure to make objection at the time the proofs are sent in.

One of the conditions of the policy in suit provided that "in case of any sale, alienation, transfer, or *change of title*," the contract should be void. *Held*, that a mortgage was not within the restriction.

By the Court, BOSWORTH, C. J. (after ruling as stated in the first head note) . . . Does the giving of the mortgage work a "change of title," within the meaning of the policy? If it does, then if the goods were mortgaged when insured, payment of the mortgage before the loss would also work "a change of title." Such a construction makes the words equivalent to *alteration in, or modification of, the nature of the title*.

I think the words "change of title," as used in this policy, should be construed to mean some act which *divests it* absolutely, and thus permit the words, "the entry of the foreclosure of a mortgage," to have a natural, and not a forced application.

Construing the whole as permitting the insured to mortgage where he retains possession and has the right of possession, without avoiding the policy, then the same effect is given to an entry to foreclose the mortgage as to the levy of an execution, either of which the parties agree shall be deemed an alienation.

Any other construction would restrict the application of the words, "the entry of the foreclosure of a mortgage," to goods mortgaged when the policy was issued, and would defeat the policy by reason of the mere fact of paying the mortgage prior to a loss.

For whatever change of title is effected by the mere execution of a mortgage, a corresponding change is produced by satisfying it.

Orrell v. Hampden Fire Ins. Co. 13 Gray, 431, *ante*, is not an authority to the point that a mortgage is a change of title, within the meaning of a policy written like the present. The concluding part of the opinion is, that to constitute a breach of the condition of insurance, "there must have been an actual sale or

¹ 1 Robt. 55.

transfer of property, valid as between the parties." All else that is said is qualified by the word "perhaps," and does not touch a point in judgment.

In *Abbott v. Hampden Mut. Ins. Co.* 30 Maine Rep. 414,¹ one article of the defendants' by-laws was, that the policy should be void if the assured should sell or alienate the property, in whole or in part, without consent of the company. The conveyances in that case were held to be *an alienation in part*. This case, therefore, has not much application to the case before us.

In *Edmands v. Mut. Safety Fire Ins. Co.* 1 Allen, 311,² the by-laws provide that "all alienations and *alterations in the ownership*, situation, or state of the property insured by this company, in any material particular, shall make void any policy covering such property." A subsequent mortgage of the property was said to be "*an alteration in the ownership*. . . . It introduces a new owner to the extent of the sum secured by the mortgage, and to the same extent it takes away the direct interest of the assured." That case may be conceded to be correctly decided, upon the particular facts of the case, and yet not be an authority in support of the proposition that a mortgage, though not due, and not giving the mortgagee a right to the possession of the property, works "a change of title," within the meaning of the policy, in the case at bar. In neither of the three cases last cited does there appear to be any clause in the by-laws to the effect that "the entry of the foreclosure of a mortgage" shall be deemed an alienation.

Within the good sense and spirit of the terms of the body of the policy, and of the fourth condition, the words, "any *sale, alienation, or transfer*," should be construed as applying to acts which terminate the interest of the assured. By the body of the policy, property "*sold, but not delivered*," is insured. This shows that "sale" means an executed contract of sale, which has transferred the title. Applying the maxim *noscitur a sociis* to the words, "change of title," and keeping in mind the further provision, that "the entry of the foreclosure of a mortgage" shall be deemed an alienation, the conclusion is reasonable, and I think clear, that the change of title here meant is a termination of it, and that the giving of the mortgage no more worked a change of title, within the meaning of the policy, than it did

¹ *Ante*, vol. 3, p. 86.

² *Ante*, p. 540.

Completion of Contract. — Oral Renewal.

a transfer or alienation. That it is not an alienation, within the meaning of the policy, is settled.

If these views are correct, the further questions involved in the other exceptions taken need not be considered, and the judgment should be affirmed.

Ordered accordingly.

AUDUBON, executrix, vs. EXCELSIOR INSURANCE CO.¹

(Court of Appeals, New York, June, 1863.)

Completion of Contract. — Oral Renewal.

A policy having expired, and the insured desiring a renewal, he was told by the secretary of the company that the insurance would be granted, and he would send the policy on the following Monday morning. A loss having occurred in the mean time; *held*, that a jury were authorized in finding the company liable.

ACTION upon an alleged contract for the insurance of certain engraved plates and letter-press matter for "Audubon's Quadrapeds of North America." This insurance, as was alleged, was a renewal of a previous contract, and was made orally with the defendants' secretary, and one Desmond. The further facts are sufficiently stated in the opinion.

DENIO, C. J. The question upon the merits arises upon the denial of the motion for a nonsuit; and, upon reviewing that decision, we must assume that the testimony of Desmond disclosed the true character of the interview between himself and the defendants' secretary. There was no dispute as to the authority of that officer to do what he professed to do on that occasion. It was shown that the Messrs. Audubon were in the habit of sending sets of their works to be bound by Taylor, at his place of business, at No. 10 Spruce Street, and of procuring insurance thereon for a short time which it would require to bind and return them. About two months before the contract relied on in this action, they sent certain sets to this binder, and procured a policy thereon from the defendants for \$1,000, for one month. That risk expired without any loss having occurred. They then sent to Taylor five sets more for the same purpose, and immediately dispatched Desmond to the defendants, to have those insured for a month, which was, apparently, the time required for binding them. He stated to the secretary the purport of the errand, in a sufficiently precise manner to embrace all the terms of a policy, except the rate of premium they were willing to pay. In the conversation which occurred, reference was made to the former

Completion of Contract. — Oral Renewal.

policy of January, upon other sets of the plates; the secretary himself spoke of it, and he said positively that the company would insure the plates upon which insurance was then desired, and would send the policy to the owners, who had a known place of business near by, on the following Monday morning. This, I think, was an agreement to insure presently, and to furnish the written evidence as soon as it could conveniently be prepared. Both parties knew the premium which had been paid for a risk of precisely the same character, two months before. As nothing was said about any change of premium, it was a fair inference of fact that it was to be the same, and the minds of the parties met upon that amount. This embraced all the essential terms of a perfect contract of insurance upon that risk. The only question, then, is whether, by a fair construction of that contract, the risk was to commence presently or two days afterwards, when the policy was to be sent. I feel confident that the former was what was intended. The property was very valuable for its bulk, and quite combustible, and an owner of such property, who did not intend to be his own insurer, would certainly desire to have it constantly covered by insurance. The delay was for the insurers' own convenience, and not for that of the owners of the property; and if the company were unwilling, for any reason, to enter into a contract which should immediately protect it, it was the secretary's duty, knowing, as he must have done, what the desire of the owner was, to have said that the risk would be taken to commence from and after the future period when the policy was to be delivered. I do not say that, in a case of another character, where time would be less material, and where delay would not involve any hazard, a contract would not be considered made after its terms had been settled, and the parties were waiting for a written contract to be drawn up. I put this case upon the peculiar nature of the contract of insurance, the plain intention of the insured, and the probable understanding of the parties. Probably there would, in contracts upon other subjects, be a *locus penitentie* until the instrument should be actually signed. It is true that in this case the consideration was not paid, but the owners of the property were ready to pay it, and the natural course of business would be to pay it when the policy should be delivered.

In the mean time it was a debt against the owners, for which credit was given until the delivery of the policy. Therefore, as-

Incumbrances. — Assignment.

suming Desmond's evidence to be true, I am of opinion that a present contract of the nature claimed was made between the defendants and the owners of the property. *Judgment affirmed.*

PUPKE *et als.* vs. RESOLUTE FIRE INSURANCE CO.¹ (Supreme Court, Wisconsin, June, 1863.) *Assignments. — Subsequent Acts of Assignor.*

After an assignment of a policy of insurance with the consent of the insurance company, a non-compliance with the terms of the policy by the assignor, in matters material to the interests of the company, will avoid it as against the assignee.

Such a violation of the conditions of the policy as would defeat a recovery by the party originally insured must have a like effect as against his assignee, whether it occur before or after the loss. See *Grosvenor v. Atlantic Ins. Co.*, *ante*, p. 254.

SIMPSON vs. SCOTTISH UNION FIRE AND LIFE INSURANCE CO.² (Coram Vice-Chancellor Wood, English Court of Chancery, July, 1863.) *Lessor and Lessee. — Rebuilding.*

Bill by lessor of premises against an insurance company, averred an agreement between lessor and lessee that the latter should insure the premises let, from fire; that an insurance was accordingly effected; that premises were burnt down; that lessor, on making inquiry of the secretary of the insurance company whether such insurance had been effected, informed the secretary of the agreement; that the said secretary then stated that the company considered the destruction of the house a suspicious case; that the lessor thereupon informed the secretary that "he claimed to be entitled, as owner or lessor of the premises, to the benefit of the policy; and to have the same either laid out or expended in or towards the rebuilding" of the premises, "or paid to the plaintiff for that purpose;" that the plaintiff, at the conclusion of such interview, stated he relied on the company paying nothing to the lessee, and that the defendant assented thereto; that, notwithstanding the company had compromised with the lessor, and obtained a discharge of all liability under the policy from him, that the plaintiff had rebuilt the premises; and prayed payment of the policy money in respect of such rebuilding. On demurrer for want of equity, *held*, first, that no sufficient request, within the 14 Geo. 3, c. 78, s. 83, was alleged. Secondly, that even if there had been, the plaintiff's right was to have the money applied by the company in rebuilding, not to rebuild himself, and charge the company with the expense; and, thirdly, that the plaintiff's remedy was by *mandamus*.

Whether the 14 Geo. 3, c. 78, s. 83, applies to property without the bills of mortality, *quære*.

JOHNSTONE vs. NIAGARA DISTRICT MUTUAL INSURANCE CO.³ (Common Pleas, Upper Canada, Trinity Term, 1863.) *Incumbrances. — Assignment.*

To a declaration against a mutual insurance company on a policy of insurance against fire, defendant pleaded, 1st. That at the time of effecting the insurance the plaintiff had mortgaged the premises, which fact was material and necessary to be made known to defendant, but that plaintiff wrongfully and fraudulently concealed the same. 2d. That at the time of making the insurance the plaintiff had not a title unincumbered, but the buildings and land were incumbered by the mortgage in the first plea mentioned, and that plaintiff in his application did not express the true title, nor the incumbrance, ac-

¹ 17 Wisc. 378.² 9 Jurist N. S. 711.³ 13 Upper Can. C. P. 331.

Waiver. — Equity of Redemption.

ording to the conditions of the policy and the statute in that behalf, but, on the contrary, stated the premises were freehold property, whereby the said policy became void.

Replication to 1st plea on equitable grounds, that G. an agent of the defendants filled up the plaintiff's application with notice of the incumbrance, and that plaintiff, in ignorance of the requirements of the defendants or of the statute, signed the application. That before the fire G., still being agent, informed plaintiff that he had omitted to state the incumbrance in the application, and that it would be necessary to assign the policy to the mortgagee, and to obtain the assent of defendants thereto; that the policy before the fire was assigned to the mortgagee, and notice thereof sent by G. to the defendants, who consented thereto, and that the mortgagee has ever since held the assignment, and the action is brought as to the amount of such incumbrance for the benefit of the mortgagee, and as to the residue for the benefit of the plaintiff. That subject to the incumbrance plaintiff was the owner of the premises, and that from the time of such last mentioned application and consent the policy was a good, &c., policy.

Replication to 2d plea on equitable grounds admits that the incumbrance was not stated in the application, but that it was prepared by defendants' agent with the notice of it, and that plaintiff, having no notice that it was necessary to mention it, signed the application, &c., as in the replication to the 1st plea, concluding with a statement that the last application of the plaintiff did duly express the true title of the plaintiff and the incumbrances.

Rejoinder to 1st replication on equitable grounds, that it is one of the conditions contained in the application, that all agents were to be considered the agents of the applicants, so far as relates to making application, and that the company should not be bound by any statement made to the agent not contained in the application; that G. was at the time of the application acting under the said conditions, as the plaintiff knew, and by force thereof was plaintiff's agent; that the mortgage was not then communicated by G. to defendants, nor expressed in any way, nor was it set out in the policy, and defendants never had notice that the incumbrance existed before and at the time of effecting the policy till after the fire. That the notice set out in the replication was written more than one and a half years after the effecting the policy, and did not communicate the fact that the mortgage had been made before the effecting the insurance; nor did it contain the true amount for which the mortgage was given, but a much smaller amount; that defendants assented to the assignment of the policy in ignorance of these facts, and the policy was thereby and by operation of the statute void; that defendants never otherwise ratified the assignment.

Rejoinder to 2d replication on equitable grounds similar to the rejoinder to the 1st replication.

Demurrer to 1st and 2d rejoinder, because it tenders an immaterial issue, attempting to put in issue the notice to the defendants at the time of effecting the insurance, whereas the plaintiff, in the replication, relies not only on the knowledge of the defendants' agent, but on the notice of the incumbrance at the time when the policy was transferred and the transfer was assented to, that the issue tendered on the amount for which the mortgage was given was immaterial, as plaintiff need only have made known to defendants the amount due on the incumbrance at the time of effecting the insurance. *Held*, that the rejoinders to the plaintiff's replications are in substance good answers thereto.

DAVID HEATON vs. MANHATTAN FIRE INSURANCE CO.¹ (Supreme Court, Rhode Island, September Term, 1863.) *Waiver. — Equity of Redemption.*

An insurance company may waive a condition in its usual form of policy, that in order that the policy should be binding the premium must be actually paid, as well as any other condition in the contract intended for its benefit; and if the insured is allowed to act upon the confidence of such waiver, the company is estopped to deny the fulfilment of the condition.

Terminating Policy. — Notice.

Where the insurance of the interest of mortgagee in possession of certain woollen machinery is renewed, as of the 1st day of December, 1861, it will not affect the policy by way of misrepresentation of his interest in the subject of insurance, if on the 2d day of December, 1861, he take a release of the equity of redemption from the assignors of the mortgagor, although the renewal be procured after the release; nor will such release affect his insurance by way of merging his mortgage, where his mortgage is, at the time, pledged to a bank as security for his indorsements, and his interest and design is, that it should be kept separate from the equity. The clause in a policy, that if the property insured "shall be sold or conveyed, this policy shall be null and void," refers to a sale or conveyance of it by the insured, determining his interest in the subject of insurance, and not to a sale or conveyance to him, to the increase of his interest in it.

WILLIAM EMMOTT vs. SLATER MUTUAL FIRE INSURANCE Co.¹

(Supreme Court, Rhode Island, September Term, 1863.)

Terminating Policy. — Notice.

One of the by-laws of a mutual fire insurance company, annexed to and made a part of its policies, provided, amongst other things, that it should "be optional with the company to terminate the insurance after seven days' notice given to the insured, or his representative, of their intention to do so," in which case, they were to refund a ratable portion of the premium. In winding up the affairs of the company, under a company vote to that effect, the directors and their committee ordered that the class of policies which included the plaintiff's should be cancelled on the 15th February, "or as soon after the date named as shall be found practicable, allowing for due notice to all parties, and reasonable time to procure new insurance." On the evening of the 13th February, but after the closing of the post-office, a notice, directed to the plaintiff, was deposited in the post-office, informing him that all policies of the class of his would be cancelled on the 20th of February, and that from and after that date no member of the class would be held insured or liable to assessment. The plaintiff received this notice on the 14th February, and on the 22d February his property covered by the policy was destroyed by fire. *Held*, in a suit by him upon the policy, that he could not recover this loss, inasmuch as at the time of the loss his policy had been cancelled, and he had, within the letter and spirit of the by-law, received seven days' notice of the intent of the company to cancel his policy on a day subsequent to the giving of the notice.

ASSUMPSIT upon a policy of insurance issued by the defendants, — a mutual fire insurance company, — insuring the plaintiff as a member of said company, subject to the conditions and limitations of the charter and by-laws of the company annexed, — in the sum of one thousand dollars, on his machinery and stock, contained in the third story of a building situated on the corner of Smith and Charles streets, in Providence.

The case was submitted to the court, without a jury, under the general issue, when it appeared that the 13th article of the by-laws of the company, made a part of the policy, was as follows: —

"Article 13. Cancelling policies. When buildings or other property insured shall be alienated by sale or otherwise, the in-

Terminating Policy. — Notice.

sured may surrender his policy and receive back his deposit note, if no unpaid assessment is due thereon, and the directors may order returned such portions of the previously paid premiums as shall seem equitably due; and if from any cause the company shall so elect, it shall be optional with the company to terminate the insurance after seven days' notice given to the insured or his representative of their intention to do so, in which case they shall refund a ratable portion of the premium."

On the 9th day of January, 1868, at a corporation meeting, duly held, it was resolved, as follows:—

"Resolved, That the board of directors be, and they are hereby directed to proceed at once to take the necessary steps to close the risks, pay the debts, and wind up the affairs of the company in such manner as they shall find to be lawful and just to all parties concerned."

Pursuant to this vote, the board of directors appointed a committee, consisting of the president and two others, with full power to carry the vote of the company into effect, who adopted a plan for the purpose, proposed by the president, and which he was authorized and directed to carry out, the first section of which was:—

"1st. To cancel all the policies, crediting unearned premiums to the holders; the cancellation to take effect as follows: in the manufacturers' class, February 1st; general class, February 15th; dwelling-house class, March 1st, 1863; or as soon after the dates named as shall be found practicable, allowing for due notice to all parties, and reasonable time for procuring new insurance."

On the evening of 13th February, 1863, but after the post-office had closed, the president of the company placed in the post-office of Providence, directed to the plaintiff, a notice of the cancellation of his policy, together with like notices to all others of his class, of which the following is a copy, which the plaintiff received on the morning of the 14th February, 1863:—

"Office of the Slater Mutual Fire Ins. Co., No. 33 Westminster Street,
Providence, Feb. 6, 1863.

"To WM. EMMOTT, Providence, R. I.:—

"Notice is hereby given, that all policies in the general class¹ of this company will be cancelled on the 20th day of the present

¹ "The general class includes all policies except those marked 'manufacturers' class' or 'dwelling-house department.'"

Terminating Policy. — Notice.

month at noon ; consequently, from and after that date, no member of said class will be held insured, or liable to assessment for any after loss therein. All unearned premiums on said policies will be credited to the holders, and allowed in closing the affairs of the company. This cancellation is made under a power for that purpose reserved in the by-laws, and in pursuance of a vote of the company to close the business. Please fill out and sign the subjoined receipt and return it to this office.

“ (Signed) CALEB FARNUM, *President.* ”

The plaintiff's policy fell within the general class to which the notice given to him applied. The property insured by his policy was destroyed by fire on the 22d day of February, 1863.

The question submitted was, whether the notice was sufficient under the by-law, seven days' notice prior to the period fixed therein for cancellation not having been given, though seven days' notice was given prior to the loss.

AMES, C. J. The plan adopted by the directors and their committee for winding up the affairs of this company, in pursuance of the corporate vote, was, to cancel the general class of policies, of which the plaintiff's was one, on the 15th day of February, 1863, “ or as soon after the date named as shall be found practicable, allowing for due notice to all parties and reasonable time to procure new insurance.” In other words, the cancellation of this class of policies was to take place as soon after the day named as the seven days' notice of the intent to cancel, required by the by-law, had been given. The cancellation was thus made prospective, and dependent, as it must be, to bind the policy holder, for the day upon which it took effect upon his receipt of notice.

The notice received by the plaintiff on the 14th day of February informed him, in substance, that from and after the 20th of that month “ no member of his class would be held insured,” as the policy would be cancelled at noon on that day, under the power reserved by the by-law, and in pursuance of the vote of the company. The purpose of the by-law, in requiring seven days' notice of the intent to cancel his policy to be given to a member before the cancellation would become effectual, was, to give him seasonable warning, if he would be protected by insurance to get it elsewhere. This purpose seems to us to have been

Material Misrepresentations.

as fully answered by the notice given to the plaintiff, as if the 21st day of February, instead of the 20th, had been inserted in the notice as the day from and after which his policy would stand cancelled, by warning him to procure other insurance earlier than the by-law, considering the time he received the notice, permitted; it could not mislead him to his injury; and when the seven days had expired, after his receipt of the notice, he had all the notice which the by-law, either in its letter or spirit, required; that is, seven days' notice of the intent of the company to cancel his policy on a day subsequent to the giving of the notice.

As the loss happened after the plaintiff had received the seven days' notice of the intent to cancel his policy, we hold that his policy was then cancelled, and order judgment to be entered up for the defendants, with costs.

BARRE BOOT COMPANY vs. MILFORD MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, October Term, 1863.)

Material Misrepresentations.

Under St. 1861, c. 152, which provides that "in all insurance against losses by fire the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company, as such, shall be considered as a warranty or part of the contract," an express condition in the body of a policy that the application contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as the same are known to the insured and material to the risk, will authorize the company to resist payment of a loss on the ground that the application contained material misrepresentations in those respects.

CONTRACT upon a policy of insurance for \$2,000, dated June 1, 1862, by which the defendants insured the plaintiffs' stock of boots manufactured and in process of manufacture in their shop in Barre. At the trial in this court, Chapman, J., ruled that, under St. 1861, c. 152, the evidence offered in defence of the action was incompetent; whereupon the case was taken from the jury and the question of the competency of the evidence reserved for the full court, with the agreement that if the evidence should have been admitted a new trial should be ordered, but otherwise judgment should be entered for the plaintiffs. The material facts are stated in the opinion.

HOAR, J. This case depends upon the construction of St.

¹ 7 Allen, 42.

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1861, c. 152, which was in force when the policy was issued, and is as follows: "In all insurance against losses by fire hereafter made by companies chartered or doing business in this commonwealth, the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company, as such, shall be considered as a warranty or part of the contract."

The policy was issued June 1, 1862, in renewal of a policy which the defendants had previously issued upon the same property, and contained this clause: "This policy is made and accepted upon the following express conditions, viz.: that the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as the same are known to the insured and material to the risk." The application for the renewal contained an agreement that the application and deposit note, upon which the policy was originally predicated, should continue valid and in force; and the farther engagement that the circumstances in regard to the condition, situation, value and hazard of the risk were not materially altered.

The defendants offered to prove that the condition of the property and hazard of the risk were materially altered by a change in the occupation of the building in which it was situated, known to the plaintiffs at the time when the application for insurance was made; but the presiding judge ruled that this evidence was incompetent under the statute above recited, and would constitute no defence to the action.

The defendants' answer alleged that this was a fraudulent misrepresentation; which would have clearly avoided the policy under another clause of the conditions which it contained, and perhaps would have had the same effect without any express stipulation. But the answer does not aver, nor does the report show, that the plaintiffs knew or believed the alterations to be material when they made the application; and therefore the defence of fraud is not supported.

The only question for our decision is, therefore, whether the condition which refers to the application is inoperative, as coming within the statute prohibition.

And, in the first place, it is evident that the condition on which the defendants rely is stated in the body of the policy; and that

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it does not, in terms, make the application, "as such," a warranty or part of the contract. The condition is that the application "contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as the same are known to the insured and material to the risk." The application contains a statement that the circumstances attending the risk had not been materially changed within a given period. The statements in the application are made a part of the contract, if at all, by a distinct reference to them in the body of the policy. Now the object of the legislature in passing the statute seems to have been to protect the insured from being misled or defrauded by a general incorporation into his contract of the application, containing, it may be, answers to a great variety of questions; and of by-laws, which are often numerous, and of doubtful interpretation. The use of the phrase "as such" in the statute leads to a strong implication that it was not intended to forbid the taking an application in writing, or to preclude all reference to its contents in the policy. On the contrary, we think if it is designed to make the truth of certain statements in the application essential to the validity of the policy, while it must be so distinctly declared in the policy itself, and the particular statements expressly pointed out, yet this may be done by explicit reference, without copying the application at length into the policy. If this were not so, it is difficult to see what value or use the application would have to the insurer.

But the practical difficulty remains of deciding how explicit the reference to the application must be, to avoid the mischief against which the statute is directed. If, for example, the policy were made on the condition that there was no building nearer the one insured than those mentioned in the application; or that the value of the property was not less than the value named in the application; and these conditions were stated in the body of the policy, we could not doubt that the purpose of the statute would be answered, and the condition would be valid. But if the condition were that the application and by-laws, or either of them, should have been in all respects conformed to by the insured, this might be held such a vague and general reference as would be a mere evasion of the statute, and an attempt in substance and effect to make the application and by-laws, "as such,"

Non-disclosure. — Misrepresentation.

part of the contract. The case at bar comes very near the line, and is not wholly free from doubt. But as it is not within the letter of the statute, and as the condition in the policy gave the plaintiff distinct notice that the substantial correctness of certain statements in his application were essential to the validity of the insurance, we are of opinion that the defence of a breach of the condition was competent, and that the evidence offered to support it, which was excluded at the trial, should have been admitted.

New trial granted.

See *Campbell v. Charter Oak Fire & Marine Insurance Company*, in a note to 7 Allen, 42.

JOSEPH S. FALIS vs. CONWAY MUTUAL FIRE INSURANCE CO.¹
(Supreme Court, Massachusetts, October Term, 1863.) *Misrepresentation. — Incumbrance.*

If an application for insurance is expressly made a part of the policy, and the policy is also made subject to the conditions and limitations expressed in the by-laws annexed, and these by-laws provide that the policy shall be void if the application shall not express the true title of the assured to the property and his interest therein, an answer that the applicant owns the property to be insured, in reply to a direct inquiry in the application upon that subject, when in fact he only holds a bond for a deed, will avoid the policy.

So an answer in such application that the property is incumbered "for \$1,000 with other property," in reply to the question, "Is it incumbered by mortgage or otherwise? If so, for what sum?" will avoid the policy, if in fact there is a mortgage for \$1,400 upon the property insured and other property.

ELISHA JACOBS vs. EAGLE MUTUAL FIRE INSURANCE CO.²
(Supreme Court, Massachusetts, October Term, 1863.) *Non-disclosure. — Misrepresentation.*

If prior to the passage of St. 1861, ch. 152, a policy of insurance was issued under the conditions and limitations expressed in the by-laws of the insurance company, one of which was that when any property insured should be taken possession of by a mortgagee the policy should be void, and the application, which was expressly made a part of the policy, contained an agreement that if the answers therein did not give a full; just, and true exposition of all the facts and circumstances in relation to the condition, situation, value, and risk of the property to be insured the policy should be void, the omission to disclose in the application the fact that possession of the premises to be insured had been taken under a second mortgage thereof, and a subsequent retaking of possession under the same mortgage, without the consent of the underwriters, will avoid the policy.

Such policy will also be rendered invalid if, in reply to a question in the application calling for the amount of incumbrances, the answer was that there were two mortgages for \$2,700 in all, the first of which was for \$1,150, and the second for \$1,550, when in fact the first was for \$1,150 as principal, and for accrued interest to the amount of \$300 more.

¹ 7 Allen, 46.

² 7 Allen, 132.

Liquors. — Description of Property. — Storing. — Hazardous Goods.

PATRICK B. MURPHY vs. PEOPLE'S EQUITABLE MUTUAL FIRE INSURANCE Co.¹ (Supreme Court, Massachusetts, October Term, 1863.) *Pleading. — Waiver. — Misrepresentation. — Estoppel.*

If the plaintiff in an action on a policy of insurance voluntarily files a replication, which simply alleges that the defendants have waived the objections stated in the answer, he thereby admits the truth of the facts therein contained. If an application for insurance is expressly made a part of the policy, an answer in the application falsely denying the existence of incumbrances on the property to be insured will avoid the policy.

A vote by directors of a mutual insurance company, authorizing one of their number and their treasurer to settle a loss, and partial payments actually made by the treasurer upon trustees' processes in which the company were summoned as trustees of the assured, and statements by different officers of the company to the assured that his claim ought to be paid, will not estop the company from defending an action upon the policy, on the ground of misrepresentation in the application for insurance, if it does not appear that the assured has changed his position in reference to his claim, in consequence of these acts and declarations.

SOLOMON F. TOWNE vs. FITCHBURG MUTUAL FIRE INSURANCE Co.² (Supreme Court, Massachusetts, October Term, 1863.) *Misrepresentation. — Incumbrances.*

If an application for insurance is expressly made a part of the policy, and the policy is also made subject to the conditions and limitations expressed in the by-laws annexed, and these by-laws provide that the policy shall be void if the application shall not contain a full, fair, and substantially true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and material to the risk, and the premises are subject to two mortgages made by the insured, the mentioning of only one of them, in reply to a question in the application, "Is the property mortgaged or otherwise incumbered, and to what amount?" will avoid the policy. And the fact that the insured did not then recollect the other mortgage is immaterial.

NIAGARA FIRE INSURANCE CO. vs. HENRY DE GRAFF.
(Supreme Court, Michigan, October Term, 1863.)

Liquors. — Description of Property. — Storing. — Hazardous Goods.

Spirituuous liquors illegally kept for sale may, notwithstanding, be lawfully insured against destruction by fire. The risks insured against are not the consequences of illegal acts, but of accidents.

Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituuous liquors constituted a part of the stock, it was held that whether they were included in the term "groceries" in the policy was a question of fact for the jury.

A policy of insurance against fire provided that the policy should be void if the premises were used for storing or keeping therein any articles included in certain classes of hazards annexed to the policy, "except as herein specially provided, or hereafter agreed to by [the insurers] in writing upon this policy." It was held that where a stock was insured under the general designation of "groceries," which included some of these hazardous articles, the insurance by this designation did specially provide for them "in writing upon the policy."

A clause in a fire policy which provided that if gunpowder or other articles subject to legal

¹ 7 Allen, 239.

² 7 Allen, 51.

³ 12 Mich. 124.

Liquors. — Description of Property. — Storing. — Hazardous Goods.

restriction should be kept in greater quantities or in a different manner than was provided by law, the policy should be void, was *held* to have reference only to articles of an intrinsically dangerous nature as liable to cause injury accidentally or by carelessness, and not to refer to liquors, the traffic in which was made illegal by statute.

ERROR to Lenawee Circuit.

The plaintiffs in error insured De Graff "against loss or damage by fire to the amount of \$1,500, as follows: \$500 on dry goods contained in the wood building occupied by assured; \$200 on groceries; \$100 on hardware; \$100 on boots and shoes; \$50 on crockery; \$50 on hats and caps; all contained in the wood store on south side of Main Street, village of Palmyra; \$500 on dwelling-house." The policy provided that if the premises "shall be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein any articles, goods, or merchandise, denominated *hazardous*, or *extra hazardous*, or *specially hazardous*, in the second class of the classes of hazards attached to this policy, except as herein specially provided for, or hereafter agreed to by this corporation in writing upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect." "Whenever gunpowder, or other article subject to legal restriction, shall be kept in said premises, in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for herein, this policy shall be null and void."

Attached to the policy was an enumeration of "classes of hazards." In the second class were enumerated as follows:—

Hazardous, No. 2. China or earthenware, grocers' stocks, gum shellac, oil, provisions, *spirituous liquors*, sugars, sulphur, tallow, &c.

Extra hazardous, No. 2. *Alcohol*, apothecaries' stocks, &c.

There was no indorsement upon the policy, and no special provision in it, assenting in terms to the keeping by De Graff of gunpowder, drugs and medicines, spirituous liquors, or alcohol.

The action was brought to recover the insurance upon the goods, which had been destroyed by fire. By the bill of exceptions settled in the case, it appears that on the trial it was proved on the part of the plaintiff, that at the time of the issuing of the policy, and from that time to the time of the fire, he was engaged in the business of a retail country store at Palmyra; that his stock consisted of dry goods, groceries, crockery, and hardware,

boots and shoes, hats and caps, together with a small amount of drugs and medicines, consisting chiefly of pills, plasters, patent medicines, roots and barks. He also kept alcohol for sale to the amount of not exceeding a barrel, and also a few bottles of spirituous liquors sealed up in bottles, for sale at retail by the bottle.

The plaintiff also gave evidence tending to show, and which he claimed did show, that at the time he made application for the insurance he told the agent of the defendant who issued the policy, that he wanted an insurance on his stock of goods which he described; that he informed the agent, among other things, in answer to a question by him, that he kept alcohol and spirituous liquors as aforesaid; that said agent then drew up the application and that the plaintiff signed it; which statement was denied by the testimony of the agent, R. B. Robbins, who testified that he was not informed by the plaintiff that alcohol or spirituous liquors were kept for retail in said store.

For the defence the judge was asked to charge the jury: That the articles of alcohol and spirituous liquors (since the Prohibitory Liquor Law, forbidding all persons from selling or keeping for sale spirituous or intoxicating liquors) are not included in the term "groceries," as used in referring to goods kept for sale. The judge refused so to charge, but charged the jury that that question was a question of fact for the jury. He also, at the request of the plaintiff, further charged, that by the conditions attached to the policy the keeping of alcohol is no more prohibited than sugars, provisions, or tallow, if it constitute a part of an ordinary grocer's stock; that the enumeration of oils, gum shellac, provisions, sulphur, tallow, *alcohol*, &c., in the conditions attached to the policy, together with grocers' stocks, does not make it necessary to specify such things when an insurance is being taken on the stock itself, when they constitute a part thereof. In other words, the insurance of a stock of groceries is an insurance of everything commonly kept and sold under that head, and the insurer is apprised, by an application for insurance on groceries, that the insured keeps or may keep any and all of the articles commonly kept and sold under the denomination of groceries; otherwise an insurance on a stock of groceries would be an insurance conditioned to be void if certain prominent articles of groceries were kept; that if the articles above enumerated, or any others denominated hazardous or extra hazardous in the conditions, are

commonly kept and sold as a part of a grocer's stock, then in insuring a stock of groceries, the hazard from keeping those articles is charged and paid for, and the risk thereon assumed by the insurer, whether the insurer was specially informed of those articles constituting a part of the stock or not, unless there was a concealment on the part of the insured.

The counsel for the plaintiff further requested the judge to charge the jury, that the keeping of a small quantity of gunpowder for retail, as part of plaintiff's stock, would not render the policy void; which request was refused. The counsel for the plaintiff also further requested the judge to charge the jury each of the following several propositions: —

1. That the keeping of a small quantity of alcohol or alcoholic liquors as a part of his stock would not render the insurance void.

2. That if the jury find that alcohol and alcoholic liquors, gunpowder, and drugs and medicines, in moderate quantities, for retail, usually constitute part of a stock of groceries in such a store as plaintiff's, the fact that plaintiff so kept them as part of his stock would not render his policy void.

3. That if the jury find that the plaintiff, at the time of applying for his insurance, omitted to disclose the fact that he kept in his stock any of the articles above mentioned, that would not render his policy void unless he knew that the fact of keeping them would have a tendency either to prevent his getting the insurance or to make the rate of premium higher, and concealed the fact with fraudulent intent.

4. (If the court should hold that the keeping of alcohol or alcoholic liquors for sale by plaintiff was illegal, and that the insurance thereof was on that account void — then) That the illegality of keeping such liquors would not affect the insurance upon the remaining portion of the stock.

5. That the provision in the policy against storing or keeping in the premises mentioned therein certain hazardous articles therein referred to, is not to be construed as prohibiting the keeping of a small quantity of any of the articles which usually constitute a stock of groceries in a country store, where the storing or keeping of such articles is not the principal business to which the premises are devoted, but the same are only kept for retail as part of a general stock.

All of which requests were refused. But the judge did charge,

at the request of the counsel for plaintiff, that whether the agent was actually informed by De Graff that he kept a small quantity of alcohol and liquors sealed up in bottles as a part of his stock, as testified to by De Graff, was a question of fact for the jury.

The judge further, at the request of the counsel for the defendants, instructed the jury as follows: —

1. That the keeping alcohol for sale in the store where the goods were kept was in violation of the conditions of the policy; and if the jury believe that alcohol was so kept before and at the time of the fire, the plaintiff cannot recover.

2. That the keeping of drugs and medicines in the store where the goods were kept was in violation of the conditions of the policy; and if the jury believe that drugs and medicines were so kept before and at the time of the fire, the plaintiff cannot recover.

3. That the policy insuring specific articles under the different heads of dry goods, groceries, hardware, crockery, boots and shoes, hats and caps, authorizes the keeping of those prohibited articles only which come under these specific classes.

4. That the term "groceries" applied to property insured as in this case is not to be presumed to apply to any articles kept for an illegal purpose, or to operate as an express assent to a waiver of the conditions annexed to the policy.

5. That the conditions of the policy, as well as the conditions annexed to the policy, are by operation of law made express warranties, and any violation of them or any part of them, whether accompanied by fraud or not, renders the policy void, and the plaintiff cannot recover.

6. That this policy, insuring specific classes of articles, and not by its terms including the stock of a country store, does not authorize the keeping of any articles prohibited by the policy not included in any of those specific classes, because of their being usually kept in a country store.

7. That the provision of the policy, "Whenever gunpowder or any other article subject to legal restriction shall be kept in said premises in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for herein, this policy shall be null and void," prohibits the keeping of spirituous liquors or alcohol

for sale contrary to the provisions of the Prohibitory Liquor Law, and if the jury find they were so kept, the plaintiff cannot recover.

The jury returned a verdict for the plaintiff.

CAMPBELL, J. Plaintiffs in error insured De Graff upon his stock of goods, described in his application as a "stock of dry goods, groceries," &c., dividing the risk into specific sums on dry goods, groceries, hardware, and other things specifically mentioned. There was evidence tending to show that he had in his store a few bottles of spirituous liquors, and a barrel of alcohol. Alcohol was among the articles mentioned in the second class of hazards, in the second sub-division of extra hazards. Grocers' stocks generally were in the first sub-division of the same class. Bottled spirituous liquors were not classed as extra hazardous, but were included in the first class of ordinary hazards in the second division of hazardous. There was evidence tending to show that the insurance agent who drew up the application was informed of the presence of the liquors and alcohol, which was however denied by the agent. The property being destroyed, a suit was brought on the policy, and judgment was recovered. Error is brought on the rulings upon the trial. The points taken refer mostly to a clause in the policy which declared that if the store should be used "for storing or keeping therein any articles, goods, or merchandise, denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, except as herein specially provided for, or hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect." There was a further clause annulling the policy whenever gunpowder or any other articles subject to legal restriction should be kept in greater quantities or in a different manner than prescribed by law.

The court below refused to charge, as requested, that since the passage of the Prohibitory Liquor Law alcohol and spirituous liquors are not included in the term "groceries" as used in referring to goods kept for sale; and charged that the question whether they were so included was one of fact for the jury. To this exception is taken.

It was claimed on behalf of the plaintiffs in error that if these liquors can be allowed to be included in a policy, the policy

will be to all intents and purposes insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact, that in each instance it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriter becomes thus directly a party to an illegal act. So insuring a lottery ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were in express terms a policy insuring the party selling liquors against loss by fire or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident. *Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties. *Hibbard v. People*, 4 Mich. 125; *Bagg v. Jerome*, 7 Mich. 145. If the owner sees fit to retain his property without selling it, or to transmit it into another state or country, he can do so. By insuring his property the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected. In the case of *The Ocean Insurance Co. v. Polleys*, 13 Pet. 157, an insurance upon a ship known by the insurance company to be liable to forfeiture under the registry laws of the United States, was held valid, and a recovery was permitted for a loss while sailing under papers known to be illegal. The case of *Armstrong v. Toler*, 11 Wheat. 258, is still stronger. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognized by law to exist.

The question then arises, whether the court rightly left it to the jury to say, as a matter of fact, whether the term "groceries" included spirituous liquors and alcohol. That it may include

them in the absence of such a statute is not denied; the recognized definitions embracing them clearly, so that it may be doubted whether it might not, in that case, require evidence of usage to exclude that meaning if such articles existed in an insured stock of groceries. See *New York Equitable Insurance Co. v. Langdon*, 6 Wend. 623.¹ There was evidence before the jury in the case before us, that these things did in fact form a part of the stock, and evidence tending to show a knowledge of the fact by the agent. The statute does not prohibit the sale of all kinds of liquors, but, as to some, expressly recognizes the right in every one. Whatever may be the *presumption* under our present statute, as to the extent of the term "groceries," — a question not raised in the case, and upon which, therefore, it would be improper to pass, — we think the instruction asked was altogether too broad, in claiming that alcohol and other liquors could not possibly be included. The question was properly left to the jury.

If the jury found, as their verdict shows they must have done, that the term "groceries" included the liquors in question, then the other instructions complained of, which held that by insuring such a stock the liquors were embraced although extra hazardous, were clearly correct. By the use of a term including them they are "*specially provided for in writing on the policy.*" Insuring a class of goods includes what is usually contained in it, whether extra hazardous or not. See *Bryant v. Poughkeepsie Mutual Insurance Co.* 17 N. Y. 200; ² *Harper v. Albany Mutual Insurance Co.* 17 N. Y. 194; ³ *Harper v. N. Y. City Insurance Co.* 22 N. Y. 441; ⁴ *Delonguemare v. The Tradesmen's Insurance Co.* 2 Hall, 589.⁵ In these instructions the jury were directed to include the articles only if satisfied that they were commonly kept and sold as part of a grocer's stock. This qualification was sufficiently broad to prevent any improper inferences.

The clause of the policy vitiating it if gunpowder and other articles subject to legal restriction should be kept in greater quantities or in a different manner than is provided by law, was not pressed very strongly on the argument, and evidently refers only to articles of an intrinsically dangerous nature, as liable to cause injury accidentally or by carelessness. It has no reference

¹ *Ante*, vol. 1, p. 348.² *Ante*, p. 37.³ *Ante*, p. 247.⁴ *Ante*, p. 251.⁵ *Ante*, vol. 1, p. 289.

Negligence in Effecting Insurance. — Pleading.

to any risks except such as render the property more likely to be destroyed. There are no statutory provisions concerning liquors analogous to the laws restricting the use of powder.

Our attention has been called to the fact, that the other charges given on the one side and refused on the other are inconsistent with those complained of. So far as this is the case, however, they favored the plaintiffs in error, — those excepted to being the only ones which could damnify them. Had the verdict been for them, the discrepancies would have been more important in determining the rights of the other party. The question whether the jury did not find against evidence, or perversely, could only be presented in the circuit court.

The judgment should be affirmed, with costs.

MANNING, J., concurred. CHRISTIANCY, J., also concurred in the result. MARTIN, C. J., was absent.

JOHNSTON vs. GRAHAM.¹ (Common Pleas, Upper Canada, Michaelmas Term, 1863.) *Negligence in Effecting Insurance. — Pleading.*

The plaintiff declared against the defendant as agent of an insurance company, alleging that he being the owner in fee of certain premises, subject to a mortgage, had employed the defendant to effect an insurance thereon, according to the rules of the company, but that he (the defendant) had so carelessly and negligently effected such insurance, that a loss by fire having occurred, he (the plaintiff) was prevented, by reason of the careless conduct of defendant in effecting the insurance, from recovering the amount thereof, and was put to great trouble and expense in and about the bringing an action therefor.

The defendant pleaded an assignment by plaintiff to one Graham, the owner in fee, by virtue of a mortgage before the fire and before action brought.

To this the plaintiff demurred.

The defendant also took exception to the declaration on the following grounds : —

1. The amount and duration of the policy are not shown.
2. No negligence by defendant is shown.
3. That no reason was stated why the policy was bad, or that the defect was within the defendant's undertaking.
4. No agency between plaintiff and defendant shown, the latter being agent for the company, — nor any reward or consideration averred for the undertaking.
5. That the breach is larger than the promise. *Held*, first, that the assignment of the policy by the plaintiff to Graham was no more than an assignment of an ordinary *chose in action*, upon which the action must be enforced in the assignor's name.
2. That the declaration (set out above) being for a *misfeasance*, did not require an allegation of a consideration or reward to support the action ; but the defendant having undertaken to do and having done an act gratuitously, was liable for his *misfeasance* in the performance of his undertaking.
3. That the defendant, after pleading over, could not object to the want of allegation in the declaration of the amount or duration of the insurance ; and lastly, that the defendant was entitled to judgment for the insufficiency of the count, because negligence generally is different from negligence to insure according to the rules of the company.

¹ 14 Up. Can. C. P. 9.

Other Insurance. — Assignment. — Powers. — Mortgagee. — Action.

WILLIAMSON vs. NIAGARA DISTRICT MUTUAL FIRE INSURANCE Co.¹ (Common Pleas, Upper Canada, Michaelmas Term, 1863.) *Pleading. — Incumbrance.*

Declaration on a policy of insurance granted by the defendants to the plaintiff, alleging loss and notice, and as soon as possible thereafter, and within thirty days, the delivery of particulars, signed, and all the declarations made on oath, and an account verified by the oath of the plaintiff, and showing no other insurance on the premises.

The fifth plea stated the condition by which the insured is required to give a particular account under oath, and to state whether and what other insurance existed upon the premises at the time of the fire, and that plaintiff, although he had delivered his account, yet he had hitherto neglected to inform defendants whether any and what other insurance existed.

The sixth plea alleged that the property insured was incumbered by a mortgage, and that the plaintiff did not truly state his title to the land.

The plaintiff replied to the fifth plea, that no other insurance was effected on the property insured, and to the sixth that the title to the land was not incumbered.

Upon demurrer to these replications and exceptions to the pleas, *Held*, that inasmuch as the defendants in the fifth plea did not complain of the plaintiff's not having made a declaration upon oath, but that he had neglected to inform them as to whether there was any other insurance, the traverse did not come within the condition of the policy and the fifth plea was bad. *Held*, also, that the sixth plea was fully answered, the allegation of title of the insured being owner in fee of the land not being necessary, and the incumbrance being traversed.

BARNES et al. vs. UNION MUTUAL FIRE INS. CO.²

(Supreme Court, New Hampshire, December, 1863.)

Other Insurance. — Assignment. — Powers. — Mortgagee. — Action.

In reply to the question whether there was any insurance on the property, the plaintiff said no. He had in fact previously obtained insurance with the same underwriter. *Held*, that the policy was not avoided, though the charter provided that other insurance should only subsist with the consent of the defendants signified by indorsement on the policy. And if under such circumstances the defendants consent to an assignment of the policy, the policy is binding in the hands of the assignee.

A mutual company, by a by-law, may provide that a mortgagee, to whom a policy is assigned for collateral security, may have the policy ratified to him by the assent of the directors, and that he shall thenceforth have all the rights of the assured. Under such a by-law, the mortgagee and assignee may sue in his own name, and is to be regarded in all respects as the party insured.

It is no defence that in the notice of loss it was not stated that the debt of the assignee as mortgagee was also secured on other property.

The assignee may give notice of loss.

Suit may be brought in the name of an agent who has effected the insurance in his own name.

BELL, C. J. The erroneous statement in the application did not render the policy void. The defect was not of that class which renders a policy absolutely and incurably void. Its utmost effect was to render it voidable at the election of the company. Till then it remained so far in force, as to be at all times

¹ 14 Up. Can. C. P. 15.

² 45 N. H. 21.

capable of ratification or confirmation, and when confirmed, it was thenceforth valid, as if no defect had ever existed in it. The company must be taken to be aware of the error, and of all the facts connected with it, since the previous policy was in their own company. Their own records did or should show when it was to terminate, and when it was in fact discharged. When the directors then, in 1860, assented to the transfer to Dickey, and by him to the plaintiffs, they assented to them as assignments of a valid subsisting policy, by which they were bound. This was a complete ratification, and it is quite too late for them to raise objections to its validity founded on past transactions.

It has been repeatedly held, that if application for insurance is taken by an agent of an insurance company, and he knows the facts, the omission to state facts material to the risk, or an erroneous statement relative to such facts, without any fraudulent purpose, will not avoid the policy; the company will be charged with the knowledge of the agent. *Marshall v. Columbian Ins. Co.* 27 N. H. 157;¹ *Campbell v. Merchants' Ins. Co.* 37 N. H. 35;² *Clark v. Union Ins. Co.* 40 N. H. 333.³ It is equally reasonable to charge them with notice of facts, which appear upon their own records, relating to the same parties and property, especially as at the time of the directors' assent to the transfers the previous policy had been long discharged.

It is insisted that this policy was never so assigned to the plaintiffs that they became members of the company, liable for assessments, and entitled to maintain this action. In support of this position two points are urged: 1st. That a mortgage is not an alienation within the meaning of the charter and by-laws; and the assignment of a policy cannot be made to a mortgagee so as to make him a member of the company; and, 2d. That the policy having been assigned by the McKeanes to Dickey, the power of assignment for this purpose was exhausted.

The effect of the assignment and assent of the directors depends upon the provisions of the charter and by-laws, stated in the case. Under these clauses it has been held, and is to be regarded as settled, that a mortgage is not an alienation which will cause a forfeiture. *Shepherd v. Union Ins. Co.* 38 N. H. 232;⁴ *Folsom v. Belknap Ins. Co.* 30 N. H. 231;⁵ *Rollins v. Columbian Ins. Co.* 25 N. H. 200;⁶ and numerous cases elsewhere.

¹ *Ante*, vol. 3, p. 634.² *Ante*, p. 288.³ *Ante*, p. 481.⁴ *Ante*, p. 408.⁵ *Ante*, p. 23.⁶ *Ante*, vol. 3, p. 393.

At common law an assignee of a contract, negotiable instruments excepted, can maintain no action upon it, excepting in the name of his assignor, the original contracting party. And this rule is held to apply to policies of insurance, though in terms made to the party insuring and his assigns. *Rollins v. Columbian Ins. Co.* 25 N. H. 204. But if the debtor make a promise to the assignee to pay the debt to him, the assignee may maintain an action in his own name. *Wiggin v. Damrell*, 4 N. H. 75; *Currier v. Hodgdon*, 3 N. H. 82; *Edson v. Fuller*, 23 N. H. 191; *Thompson v. Emery*, 27 N. H. 273; *Shepherd v. Union Ins. Co.* 38 N. H. 238.

In the case of mutual insurance companies it has, however, been held, that, in the absence of provisions in the charter, or by-laws, or policy to that effect, an assignee cannot recover in his own name, though the company assent to the assignment. *Folsom v. Belknap Ins. Co.* 30 N. H. 241; *Jessel v. Williamsburg Ins. Co.* 3 Hill, 88;¹ *Shepherd v. Union Ins. Co.* 38 N. H. 232; *Conover v. Mutual Ins. Co.* 3 Denio, 354; *Rollins v. Columbian Ins. Co.* 25 N. H. 205.

This is manifestly an exception to the general rule of the law on the subject, founded on the peculiar nature of the contract, and the limited powers of such companies, and is not adopted in some of the states. *Phillips v. Merrimack Ins. Co.* 10 Cush. 350;² *Bennett v. Union Ins. Co.* 7 Cush. 175; *Lowell v. Middlesex Ins. Co.* 8 Cush. 127;³ *Loring v. Manufacturers' Ins. Co.* 8 Gray, 28.⁴

It is with a similar view of the nature of the contract that it is held that an assignee, to whom a policy has been confirmed by the directors, cannot maintain an action upon the policy, for any loss after the assignment, if he has no conveyance or assignment of the property insured. *Rollins v. Columbian Ins. Co.* 25 N. H. 200; *Peabody v. Washington Ins. Co.* 20 Barb. 339.

But there is no doubt of the power of a mutual insurance company, by a by-law for that purpose, to provide that a mortgagee, to whom a policy is assigned as collateral security, may have the policy ratified to him by the assent of the directors, and that he shall thenceforth have all the rights of the assured. It was so held expressly in *Rollins v. Columbian Ins. Co.* 25 N. H. 201. Under such a by-law, the mortgagee and assignee, having the policy ratified to him, may bring a suit in his own name, and is

¹ *Ante*, vol. 2, p. 190.² *Ante*, vol. 3, p. 425.³ *Ib.* p. 240.⁴ *Ante*, p. 172.

to be regarded and treated in all respects as the party assured. *Kingsley v. New England Ins. Co.* 8 Cush. 393; *Phillips v. Merimack Ins. Co.* 10 Cush. 250; *Rollins v. Columbian Ins. Co. ub. sup.*; *Flannagan v. Camden Ins. Co.* 1 Dutch. 506.

The case of *Rollins v. Columbian Ins. Co.* was, in the facts involved in this question, much like the present. Like this, the charter made provision only for cases of alienation, while a by-law declared that a mortgagee might have the policy assigned to him, ratified to him, with all the rights of the original assured. The plaintiff had a mortgage, and an assignment of the policy as collateral, which was assented to in the usual form by the directors. It was held, as we hold here, that the mortgage was not an alienation within the charter to cause a forfeiture; but that the by-law was well authorized and valid; and that the mortgagee, by the assent of the directors, became the party assured, the member of the company, and entitled to maintain the action in his own name.

Such a deliberate decision will not be overruled incidentally. It must stand until the court, upon a discussion of the very question involved in it, shall find cause to overrule it. In the case of *Shepherd v. Union Ins. Co.* 38 N. H. 237, there was no occasion to consider any of these questions, no disposition to question the propriety of the decision, or to cast a doubt upon it. On the contrary, it was cited much at length, and its doctrines approved and relied upon. In the case of *Shepherd v. Union Ins. Co.* the plaintiff was the original insured. He afterwards assigned his policy to the Savings Bank in Concord, as collateral security for a note which he owed them, but the assignment of the policy had not been assented to nor ratified by the directors. A loss arose, notices were given, and suits brought both by Shepherd and the savings bank. It was shown that the property insured was subsequently mortgaged to Caldwell, of which no notice was given to the company. It was held, in conformity to Rollins's case, that the savings bank could not maintain a suit in their own name, but the action must be in the name of the original assured; and that a mortgage was not an alienation within that clause of the charter which provided that if the property should be in any way alienated the policy should be void. It was contended that under the 16th section of the by-laws, — the same recited in this case, — when the title of any property insured shall be changed by sale, mortgage, or otherwise, the policy shall thereupon be void,

and that the mortgage to Caldwell defeated the policy. It was admitted that if the by-law had provided that if the property insured should be mortgaged the policy should be void, the parties would be bound ; but it was held that the language used did not naturally or necessarily import that a mortgage would be such change of title until after a foreclosure. There is no principle better settled than that conditions that go to destroy or divest estates or rights are to be strictly construed. *Lazarus v. Commonwealth*, 4 c. 5 Pick. 76 ; *Emerson v. Simpson*, 48 N. H. 475. It by no means follows that, because a mortgage before foreclosure is not a change of title, which, under the 16th by-law, will avoid the policy, the assignment of the policy to a mortgagee may not be assented to and ratified by the company, so as to give the assignee the rights of the original assured. It is the completed change of title by mortgage and foreclosure, which, if not ratified, avoids the policy. The execution of a mortgage is but an inchoate change of title or alienation, the first step often to that result, but the execution of the mortgage makes the mortgagee a grantee to whom the policy may be ratified. A liberal construction is to be given to the by-law, so far as it tends to allow the parties to shape their contracts and agreements according to their mutual understanding, of which in this case there can be no doubt.

There would be little reason for coming to a different conclusion, since the by-laws expressly allow an insurance to be made by the mortgagee independent of the mortgagor, which proves that the company do not object to insuring the interest of a mortgagee ; and where property is mortgaged, and the existing policy is assigned as collateral, one of the parties must in the nature of things be trustee for the other, for whatever he may recover of the sum insured above what is due to himself ; and it must be a matter of indifference to the company which of the parties is the trustee and member of the company, while the security of the mortgagee requires that he should be the party, by and to whom the notices should be given. The policy would be poor security if it was liable to be defeated by the acts or neglects of the mortgagor, whose interest may be merely nominal.

The policy in suit was assigned by Dickey to the plaintiffs, as collateral security for his mortgage of the same date, for \$4,000 on this property, and on another house and lot. It is objected that the plaintiffs' notice of the burning of the property insured

is insufficient, because it did not state the fact that their mortgage covered other property, nor state the value of the land on which the building stood, which is said to be \$500. The value of the other lot is stated to be \$200, and the building on it was insured for \$1,500.

The by-laws require an account on oath of the property lost or damaged, and the value of it at the time of the loss, whether the insured was sole owner, whether it was incumbered by mortgage, or insured in any other office, and the cause of the fire so far as known; but we have observed nothing in the charter or by-laws, which requires the statement here insisted on. And there seems very little color for any suggestion of fraud or unfairness in the omission. The amount insured was due to the plaintiffs, or if their mortgage was in part paid, to them and Dickey, and they being the parties entitled to sue as members of the company, they must recover the whole loss, and must hold whatever was not due to themselves, as trustees for Dickey. The defendants had no interest in any question relative to the state of the mortgage debt, or the sufficiency of the security.

One assessment was made against A. and N. McKean before the assignment, and one after. Dickey, who occupied and had charge of the property, was called upon and neglected to pay these assessments, more than three months before the fire. No assessment was made against the plaintiffs, nor were they ever called upon to pay, or notified of any assessment, and no notice to the McKean was shown, or request to them to pay. The claim is, that by the 12th article of the by-laws the risk of the company on the policy became suspended by the neglect of Dickey to pay the assessments. The 16th by-law provides that the grantee, or alienee by mortgage, or otherwise, of the property insured, having the policy assigned to him, by the assent of the directors, on giving new security shall have all the rights, and be subject to all the liabilities to which the original party was subject or entitled.

It seems clearly the right of the assured that his policy should not be suspended by non-payment of an assessment until he was notified of it, and payment requested. The condition of an assignee, to whom the policy was confirmed by the directors, would be essentially different, and worse than that of the original assured, if the risk of the company could be terminated, and his security destroyed by an assessment against his assignor, and notice given

to him when he may have little or no interest, and a demand of payment of him, of which the assignee can have no knowledge. A construction like this would defeat the whole object of the assignment, and seems to us entirely inadmissible.

As to any past failures to pay assessments before the assignment, the company, by their assent to the assignment, waive the provision that the policy shall be suspended if the assessments are not paid. *Hale v. Union Ins. Co.* 32 N. H. 295.¹

It is insisted that notice of the loss must be given by the original assured, or rather by the mortgagor, his assignee. This stands on the same ground as that relative to the suspension of the risk. To have "all the rights of the original party" the notice by the assignee must be as effectual as that of the assured. And we understand it to be settled that the assignment of a policy with the assent of the insurer creates new and mutual relations and rights between the assignee and the insurer, which cannot afterwards be changed by any acts or neglects of the original insured, a third person, over which the injured party may have no control. *Tillou v. Kingston Ins. Co.* 1 Seld. 405; ² *Traders' Ins. Co. v. Robert*, 9 Wend. 404; *Rollins v. Columbian Ins. Co.* 25 N. H. 205.³

It is insisted that the debt which this property and policy were assigned to secure was the property of the Loan Fund Association, and therefore the action, if it can be maintained at all, must be prosecuted in the names of the members of the association, and not by the plaintiffs.

But we think this position not well founded, because "it is usual for actions on policies of insurance to be brought in the name of the agent, or broker, instead of that of the principal. This is founded upon the promise being made to the agent;" *Paley on Agency*, 362; or as the same rule is expressed by *Story (Agency, sec. 394)*, "where a policy of insurance is procured to be underwritten by an agent in his own name, for the benefit of a particular person, or for whom it may concern, the agent may sue thereon in his own name for any loss occurring under the policy, for he is treated as a direct party to the contract, and the underwriter undertakes to pay the loss to him." *Ib.* secs. 109, 161; 2 *Stor. Eq. Jur.* sec. 400; *Usparicha v. Noble*, 13 East, 332; *Sargent v. Morris*, 3 B. & Ald. 283; *Wolf v. Horncastle*, 1

¹ *Ante*, p. 37.² *Ante*, vol. 3, p. 238.³ *Ib.* p. 393.

Alienation. — Equity of Redemption.

B. & P. 323; *Ward v. Wood*, 13 Mass. 339; *Davis v. Boardman*, 12 Mass. 80; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 73; *Parker v. Beasley*, 2 M. & S. 426; *Hagedorn v. Oliverson*, 2 M. & S. 485; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553, *ante*; *Cobb v. New England Ins. Co.* 6 Gray, 192, *ante*. And this principle was adopted and applied in the case of a policy against fire in *Goodall v. New England Ins. Co.* 25 N. H. 169.¹

And because where a promise is made to one sustaining the character of a trustee, he and not the *cestui que trust* is the proper person to bring the action upon it; *Treat v. Stanton*, 14 Conn. 445; or, as it was held in *Pierce v. Robie*, 39 Me. (4 Heath) 205, where the funds of a voluntary association are put under the control and management of trustees, and are loaned to some of its members, an action may be maintained in the name of the trustees. In the present case the plaintiffs are the trustees of such a voluntary association. The real estate, without the transfer of which the assignment of the policy would have conferred no valuable rights, was mortgaged to the plaintiffs, as trustees, the legal interest was in them, and the contract made by the consent of the directors was with them. They were made thereby the members of the insurance company, and not the whole body of the members of the Loan Fund Association, and they were in consequence the only parties entitled to bring an action in case of loss. *Blanchard v. Atlantic Ins. Co.* 33 N. H. 9, *ante*; *Nevins v. Rockingham Ins. Co.* 25 N. H. 22.² *Nonsuit set aside.*

ANDREW J. SMITH vs. MONMOUTH MUTUAL FIRE INSURANCE Co.³ (Supreme Court, Maine, Kennebec, 1863.) *Alienation. — Mortgage. — Bond of Defeasance. — Assignment.*

A mortgage held not an alienation; and this too though the mortgage was effected by giving an absolute deed and receiving back at the same time a bond of defeasance, which latter was seasonably recorded. Upon the recording of the bond this case was distinguished from *Tomlinson v. Ins. Co.*, *ante*, p. 447.

An attempt to make an assignment held not to come within the terms of the policy forbidding an assignment.

HIRAM CAMPBELL vs. HAMILTON MUTUAL INSURANCE CO.⁴

(Supreme Court, Maine, Cumberland, 1863.)

Alienation. — Equity of Redemption.

The sale of an equity of redemption is, upon the expiration of the time for redemption thereunder, an alienation.

¹ *Ante*, vol. 3, p. 385.

² *Ib.* p. 376.

³ 50 Maine, 96.

⁴ 51 Maine, 69

Alienation. — Equity of Redemption.

THE case is stated in the opinion.

APPLETON, C. J. The policy in the case before us, by its terms, is "accepted by the insured, subject at all times to the conditions and regulations of the act of incorporation and by-laws of said company, which conditions and regulations are hereby declared to form a part thereof."

It is provided by the by-laws, article 15, that "when any property insured shall be alienated or *incumbered by sale*, mortgage, assignment, bond, or *otherwise*, the policy shall thereupon be void;" and, by article 19, "policies void in part shall be void in the whole."

It was held in *Adams v. The Rockingham Mut. Fire Ins. Co.* 29 Maine, 292,¹ that an alienation had occurred, when the insured, upon his own application, had been decreed a bankrupt and his assignee in bankruptcy had been appointed. It was decided in *Edes v. Hamilton Mut. Ins. Co.* 3 Allen, 362, *ante*, that "if the owner of property, which is insured by a policy which contains an express provision that the by-laws of the company are declared to form a part thereof, mortgages the same in violation of one of the by-laws, the policy is thereby defeated." So when a by-law provides that all *alterations* in the ownership of property insured in any material particular shall make void any policy covering such property, unless consented to or approved by the directors, a mortgage of the property insured was held a material alteration in the ownership thereof. *Edmands v. Mutual Safety Fire Ins. Co.* 1 Allen, 311, *ante*.

The premises insured, at the time of their insurance, were subject to a mortgage, as appears by the application. While the insurance was in full force, the equity of redemption was sold on an execution against the insured.

An incumbrance is defined to be "whatever is a lien upon an estate."

"The right of a third person in the land in question to the diminution of the value of the land, though consistent with the passing of the fee by a deed of conveyance, is an incumbrance. So is a lien by judgment or mortgage." Bouv. Law Dictionary. "Incumbrancer: one who has an incumbrance or legal claim upon an estate." Webster's Dictionary. "Incumbrance: liabilities resting upon an estate." Worcester's Dictionary.

The estate insured was incumbered by the sale of the equity.

¹ *Ante*, vol. 3, p. 30.

Property held in Trust. — Concealment.

It passed thereby from the insured unless redeemed. It was sold, and the estate does not revert in the debtor except upon payment of the price for which it was sold. Before the title becomes perfect in the purchaser by lapse of time, it constitutes a lien or incumbrance upon the estate, which must be removed before any one could acquire an indefeasible right thereto. The equity of redemption was sold for a specific sum. That constituted an incumbrance upon the estate. The property insured was *incumbered by a sale* within the letter and the spirit of the by-law referred to, and the policy thereby became void.

The sale of an equity of redemption, when the title thus acquired is perfected by lapse of time, constitutes an alienation. Before the right of redemption has expired, it must be regarded an incumbrance upon the estate. *Plaintiff nonsuit.*

DAVIS, KENT, WALTON, and DICKERSON, JJ., concurred.

RALPH DAY vs. CHARTER OAK F. & M. INSURANCE CO.¹

(Supreme Court, Maine, Cumberland, 1862.)

Property held in Trust. — Concealment.

If one who holds property by a deed absolute on its face give an agreement to reconvey upon being indemnified for liabilities for which the deed was given, he holds the property in trust.

The requirement that the insured should accurately state the nature and extent of his interest is only fulfilled, when the property consists of several parcels in which his interest is not alike in all, by a statement of his interest in each.

THE case is stated in the opinion.

WALTON, J. The plaintiff's right to indemnity under his policy is not absolute but conditional. One of the conditions is, that "property held in trust" — which term, as therein used and explained, includes "property held as collateral security" — must be insured as such; otherwise, the policy will not cover it; and one of the questions presented is, whether any portion of the property included in the plaintiff's policy was thus held by him at the time he obtained his insurance.

On the 17th of March, 1859, Josiah F. Day conveyed to the plaintiff certain real estate, including a portion of the property covered by the plaintiff's policy, and, on the 12th of April following, took from the plaintiff a writing, in which he says: "Said conveyance was made to me with the intent and purpose of

¹ 51 Maine, 91.

Property held in Trust. — Concealment.

indemnifying and securing me for sundry advances heretofore made and hereafter to be made by me to the said Josiah F. Day, and to protect and save me harmless from all liability on any negotiable paper to which I have heretofore or may hereafter become a party, at the instance and for the accommodation of the said Josiah F. Day. Now, therefore, I do hereby acknowledge and declare that I hold said property as security aforesaid." He then promises and agrees that, upon payment of such sums as he shall have thus advanced, or paid on account of the notes, &c., he will reconvey the premises to said Josiah F. Day, or to such other person as he may appoint. It is not denied that the facts are correctly stated in this writing, nor is it pretended that the plaintiff held the property by any other title than as therein stated at the time he obtained his insurance.

The deed conveying this property to the plaintiff being upon its face absolute, the court might not admit parol evidence to show that the property was held as security merely; but here is a writing signed by the plaintiff, in which he acknowledges and declares that the property is so held by him; and, if he should be indemnified against the negotiable paper referred to, and his debt paid, without recourse to the property thus held, he would then hold the property as a mere naked trustee, without consideration; and, if applied to for the purpose, this court would be obliged to take notice of the fact, and compel him to reconvey it to Josiah F. Day, or such person as he might appoint, according to the agreement. The fact is legally established by the writing, and it seems impossible to escape the conclusion that this property was held by the plaintiff as collateral security; and was therefore "held in trust," within the meaning in which that term is used and explained in the third article of the conditions which were annexed to and made part of the plaintiff's policy. The last clause in that article is as follows: "Note.—By 'property held in trust,' is intended, property held under a deed of trust, or under the appointment of a court of law or equity, *or property held as collateral security; in which latter case this company shall be liable only to the extent of the interest of the assured in such property;*" and the fourteenth article provides for an assignment to the company of the interest of the insured in property so held, in certain cases, if required, together with the debt or payment secured thereby. Therefore the fact that

the plaintiff held this property as collateral security was important to the defendants, and should have been stated in the plaintiff's application.

It is admitted that a considerable portion of the property included in the plaintiff's policy was not owned by him; and another question presented is, whether he can recover for such portions of it as he did own, and was valued separately in the policy.

It is a well settled principle that, when required by the terms of the policy, the insured is bound to show that he has stated truly and accurately the nature and extent of his interest, or his policy will be void. One reason for this, in respect to mutual companies, is, that they have a lien on the property to secure the premium notes; but this is not the only reason, and the principle has been applied to cases where no such lien existed, and to cases where the policy covered different parcels of property valued separately, and the omission to state the true value and interest of the insured applied only as to part of the parcels. It is always material to the insurer to know what the interest of the insured is; for if valid policies could be obtained without interest, or for an amount far exceeding the interest, without disclosing the fact, such risks would be extremely hazardous by reason of the temptation which such policies would hold out to a wilful burning of the property.

Besides; insurers have a right to determine for themselves what facts are material to be disclosed, and upon what terms and conditions they will insure property; and when a risk has been assumed upon the express condition that the title or interest of the insured has been truly and accurately stated in the application, it would not only be in violation of well settled rules of law, but contrary to the plainest dictates of an enlightened morality, for the court to disregard the condition and extend the liability of the insurers to a risk which they never agreed to assume.

The third article of the conditions which are annexed to and made part of the policy now under consideration requires "the true title of the insured and the extent of his interest" to be represented to the company, and so expressed in the policy in writing, otherwise the insurance shall be void; and the fifteenth article provides that, "in any suit or action, the plaintiff must

Partition.

show the truth of all statements, and performance of all terms, conditions, and warranties, before he can recover." These, by the express terms of the policy, are conditions precedent to the plaintiff's right to recover, and yet they have not been performed. The plaintiff did not represent his true title and the extent of his interest to the company as required, and has not, therefore, shown a "performance of all terms, conditions, and warranties" necessary to entitle him to recover. One portion of the property included in his policy (the bleach room and building attached), of the estimated value of three hundred dollars, was held by the plaintiff as collateral security, but was not so represented to the defendants, or insured as such; and another portion of the property included in his policy (the press cutter, gearing, belting, and shafting; steam-pipe and fixtures for warming the mill; fire-pumps and hose and gearing), of the estimated value of three hundred and fifty dollars, the plaintiff had no interest in. These omissions are fatal to the plaintiff's right to recover for any portion of the property included in his policy. *Battles v. Ins. Co.* 41 Maine, 217; *Lovejoy v. Ins. Co.* 45 Maine, 472; *Richardson v. Ins. Co.* 46 Maine, 394; *Gould v. Ins. Co.* 47 Maine, 403; *Davenport v. Ins. Co.* 6 Cush. 340; *Smith v. Ins. Co.* 25 Barb. 497; *Patten v. Ins. Co.* 38 N. H. 338.

Exceptions sustained. Verdict set aside and new trial granted.

RICE, CUTTING, DAVIS, KENT, and DICKERSON, JJ., concurred.

NATHAN BARNES vs. THE UNION MUT. FIRE INS. CO.¹

(Supreme Court, Maine, Cumberland, 1863.)

Partition.

Partition between co-tenants, held an alienation or change of title.

THE case is stated in the opinion.

DAVIS, J. The plaintiff applied for insurance on "one half, in common and undivided," of certain buildings, and household furniture therein. In answer to the question, "Who owns and occupies the buildings," he answered, "The applicant owns and occupies the property." A fair construction of this representation of title is, that the applicant was the owner of an undivided half of the property described, and the sole owner of the property to be insured. This representation was true.

¹ 51 Me. 110.

Partition.

The by-laws of the company are expressly made a part of the policy, as conditions of the insurance. By the sixteenth article it is provided that, when the title of any property insured *shall be changed*, by sale, mortgage, or *otherwise*, the policy shall thereupon be void."

The insurance in this case was for six years. The policy was dated November 15, 1851. Upon a petition for partition, duly prosecuted by the other tenant in common, upon which judgment was rendered January 20, 1857, the premises were divided, and the plaintiff became the owner of a particular half thereof in severalty. The buildings were destroyed by fire April 1, 1857.

The partition of the property may not have been an *alienation*, as understood in matters of insurance. But when a by-law provides that any alteration or change in the title shall make the policy void, any material change in the title will have that effect, though it is not by an alienation. *Edmonds v. Mutual Safety Fire Ins. Co.* 1 Allen, 311, *ante*; *Campbell v. Hamilton Ins. Co.* 51 Maine, p. 69; *ante*, p. 723.

The title, in the case at bar, was materially changed by the partition. The effect was equivalent to an alienation, and a purchase. The plaintiff no longer owned any interest in the entire property, while he did own the entire interest in a part of it. It was the same as if he had given his co-tenant a deed of his interest in a specific part, and had received from him such a deed of the other part. His title no longer corresponded with the policy, in nature or quantity. He insured but one undivided half of *the part which he owned after it was divided*. And, after the division, he owned no part of the *other half*. If he could recover at all, which he cannot do, it would be for only *one fourth* part of the whole, or for an undivided half of the part which he continued to own after the partition.

The furniture was separately valued in the policy; and it is claimed that the plaintiff is entitled to recover for the loss of that, if he fails to recover for the loss of the buildings. But the provision in the by-laws is that, if the title is changed, *the policy shall be void*. And besides, it has been decided by this court that such a contract of insurance is indivisible, and, if rendered void by the assured in any of the items of property insured, the whole policy is void. *Lovejoy v. Augusta M. F. Ins.*

Levy of Execution.

Co. 45 Maine, 472, *ante*; *Gould v. York County Mut. Fire Ins. Co.*
47 Maine, 403, *ante*; *Day v. Charter Oak Ins. Co.*, *ante*, p. 725.

Plaintiff nonsuit.

APPLETON, C. J., KENT, WALTON, and DICKERSON, JJ., concurred.

(KENT, J., held that the representation of the plaintiff, as to the occupancy of the building, was either a misstatement or a concealment of a material fact.)

STEPHEN NEWHALL *vs.* UNION MUTUAL FIRE INSURANCE
Co.¹ (Supreme Court, Maine, Lincoln, 1863.) *Incumbrance. —*
Misrepresentation. — Stoves.

In mutual companies a lien is created upon the estate insured for security of the premium note. That only can be deemed an incumbrance on such estate which interferes with and puts in jeopardy this lien. A bond for title does not affect this lien, and therefore is not an incumbrance. *Chase v. Hamilton Fire Ins. Co.*, *ante*, distinguished.

It cannot be assumed as matter of fact, or an implication of law, that by the substitution of a cook-stove in place of an open fire, the risk of fire is increased. The burden of showing such increased risk is on the defendants.

PHILADELPHIA FIRE AND LIFE INSURANCE CO. *vs.* MILLS.²
(Supreme Court, Pennsylvania, 1863.)

Levy of Execution.

A condition in a policy of insurance that it should cease from the time that the property insured should be "levied on or taken into possession or custody, under an execution or other proceeding at law or equity," does not apply to a wrongful levy made upon the property as that of another person.

ERROR to the district court of Philadelphia. This was an action of covenant brought in the name of David W. Mills, to the use of the Mechanics' Bank of Williamsburg, against the Philadelphia Fire and Life Insurance Company, on a policy of insurance issued by defendant to William T. Mills, dated October 21, 1856, for one year, on an omnibus establishment in West Philadelphia.

The material facts of the case were these: On the 12th of September, 1856, Buchanan & Stevens, former owners of the establishment, and who had sold it to William T. Mills, brought suit against him in the district court. On the 21st day of October, 1856, William T. Mills renewed an insurance with the

¹ 52 Maine, 180.

² 44 Penn. St. 241.

Levy of Execution.

defendant for one year, covering the frame stable and stock generally of plaintiff in Twenty-fourth Ward, on the east side of Till Street, north of Market. This policy contained the following condition: "The insurance by this policy shall cease from the time that the property hereby insured shall be levied on or taken into possession or custody under an execution or other proceeding at law or equity."

On the 28th of October, 1856, Buchanan & Stevens recovered judgment against Mills for \$26,268.50. On the 8th of November, 1856, the insured property was by bill of sale transferred by William T. Mills to David W. Mills, for the consideration of \$40,000. There was no evidence in the case tending to show that D. W. Mills was at that time the owner of so large a sum of money; the proof was that he was acting as clerk for his father at \$10 a week, and that no money passed at the execution of the bill of sale, but possession was taken by him under the sale. On the 10th of November, 1856, Buchanan & Stevens sued out an execution against William T. Mills. On the 15th of November, 1856, the policy was assigned to David W. Mills, son of William T. Mills.

On the morning of the 23d of December, 1856, the property insured being in the possession of the watchman appointed by the sheriff under the above execution, was almost entirely destroyed by fire. The watchman had been sent there about a week before the fire. The sheriff made the following return to the execution: "To the Honorable Judges, &c., I do hereby certify and return, that in obedience to the within writ, I levied upon the personal property of defendant, November 10, 1856. On the morning of the 23d day of December, 1856, portion of said premises was destroyed by fire, and sold the balance of said property on the 14th day of January, 1857, for the sum of \$2,223.35. Previous to said fire a claim to said property was made by David W. Mills, and he having failed to enter bonds in court according to law, the same was sold as above." There were several matters of defence set up on the trial, but the main point relied on was, that as the property insured was levied upon under an execution after the issuing of the policy, and so continued at the time of the fire, the insurance ceased under the terms of the policy, as above stated.

The court below (Sharswood, J.) instructed the jury on this

point that, as the execution was against the father after a sale and delivery of possession to the son, the levy made under it was a wrongful levy, and that if the sale was *bond fide*, and the levy consequently wrongful, it should not be regarded as a breach of the covenant in the policy. But that if the sale was not *bond fide*, if it left the property in the father, and the son acquired none, but the transaction was intended to hinder and delay the creditors, then the levy would be such a one as the creditors had a right to make, such a one as was contemplated in the policy, and such a one as would avoid it.

There was a verdict and judgment for the plaintiff; whereupon the defendant sued out this writ, and assigned the ruling of the court, on this and the other points which were propounded, for error.

Per CURLIAM. We do not discover any error in this record, and we need not specially refer to any point in it, except that which was specially relied on in the argument. The policy was to cease when the property insured should be "levied on or taken into possession or custody under an execution or other proceeding at law or equity;" and we do not think that this expression covers a case of trespass in which the property is wrongfully seized as the property of a stranger.

Properly speaking a levy "under" any process is a levy in pursuance of the authority given by it, and an execution against one man never gives authority to levy on the goods of another. The levy in this case was not therefore properly "under" any process. And we discover no valid reason for extending this provision to the case of a wrongful levy. To do so would be to attribute to every levy that is valid in form the effect of avoiding a policy, though such levy should be invalid in substance, and should have endured but an hour. *Judgment affirmed.*

LYCOMING COUNTY MUTUAL INSURANCE CO. vs. SCHOLLENBERGER.¹ (Supreme Court, Pennsylvania, 1868.) *Powers of Agent. — Waiver. — Statement of Loss. — Assessment.*

If an insurance company, on notice of loss, refer the insured to their resident agent for settlement, and instruct the agent to procure a statement of the loss, he is thereby invested with full authority to receive, and extend the time for furnishing it; and if given within the time required by the agent, though after thirty days from the fire, the condition in the policy requiring it to be made within that time is not broken.

¹ 44 Penn. St. 259.

Lien.

Where there was any evidence as to the authority given to the agent by the company to act in the premises, and of an actual waiver of condition on the part of the agent, it was for the jury; and though a waiver must be intentional and clearly proven, the sufficiency of the evidence relating thereto is for the jury, whose error in judgment thereon can be corrected only by motion for new trial.

In an insurance of a single property (a coal-breaker) under a valued policy, where the insured, immediately after its destruction by fire, wrote to the company, stating that his "coal-breaker burnt down this morning," giving the number of his policy, and the amount of his insurance; such a statement of loss, though in the preliminary notice, was substantially a particular statement, and a compliance with the condition requiring it.

Where under a condition requiring payment of assessments within thirty days from demand and avoiding the policy until paid, a balance remained unpaid beyond that time and on the day of the fire, but was paid the same day to the agent and by him reported to the company, without objection on the part of either of them, such receipt is a waiver of the forfeiture; and that breach of condition cannot be set up against recovery on the policy.

It is not a bar to a recovery on the ground of waiver, that the declaration averred a performance of all conditions precedent, and the proof was of a dispensation with and waiver of performance, for the defect was amendable as matter of right; and after verdict, especially where the case was tried as if there had been no omission, the *verdict* will be treated as if amended.

LYCOMING COUNTY MUTUAL INSURANCE CO. *vs.* SCHREFFLER.¹
(Supreme Court, Pennsylvania, 1863.) *Action. — Parties. — Evidence.*

Whether an action on a policy of insurance may be maintained by an assignee of the policy in his own name, where it has been assigned with consent of the company, and premium note of assignee has been received and substituted in place of that of assignor: *quære*. But where the same action had before been brought up on error, the parties standing the same upon the record, the objection to the maintenance of the action in the name of the assignee alone should then have been made: but as it was not, it must be treated as waived. The report of loss made out by the agent of the company is not evidence to go to the jury, as to the amount of loss, in an action upon the policy, though accompanied by the affidavit of the party insured.

The particular statement of the plaintiff, though not evidence of the extent or amount of the loss, may be used to refresh the memory of the witness.

SOMERSET INSURANCE CO. *vs.* McANALLY.²
(Supreme Court, Pennsylvania, 1863.)

Lien.

A judgment against an insurer, which is limited in its effect, and does not extend to the insured property, is not a "lien" within the meaning of the interrogatory propounded to insurers relative to incumbrances, and will not avoid a policy of insurance which issued upon a negative answer by the party insured.

ERROR to the common pleas of Somerset County. This was an action on the case in assumpsit by James McAnally, for the use of Michael A. Sanner, against the Somerset County Mutual Fire Insurance Company.

¹ 44 Penn. St. 269.² 46 Penn. St. 41.

Lien.

The case was this: On the 12th of September, 1856, McAnally applied to the company for insurance against loss by fire of a house on the Twelfth District, Alleghany County, Maryland. Among the interrogatories, in his application, to which the assured was required to make true answers, was the following: "Is there any incumbrance upon the property to be insured?" To which he answered, "None."

In his application he covenanted and agreed, that "If any untrue answer has been given to the foregoing interrogatories, whereby the said company have been deceived as to the character of the risk, or if any change be made as to the tenants or occupancy of these premises without being notified to this company, and indorsed upon their policy, then this insurance to be void, and the policy of no effect."

Upon this application a policy was issued to him, dated 30th of September, 1856, insuring the property for three years from 12th September, 1856.

The house was destroyed by fire on the morning of the 21st of April, 1857, for which loss this action was brought.

On the trial, defendants objected to a recovery on the defence raised by the following plea, viz: "That at the time of the application by plaintiff for insurance, he was required to make true answer as to whether there was any incumbrance upon said property or not. To which he replied there was none, when, in truth and in fact, there was a judgment against the said plaintiff in the circuit court of Alleghany County, Maryland, for which said property was bound, by reason of which false statement the policy of the said plaintiff became void, and the said defendants released from all liability thereon."

In support of the issue raised by this plea, defendants produced a certified copy, the record of a case in said circuit court, wherein Henry B. Martin is plaintiff, and James McAnally, garnishee of John Martin, is defendant, showing that a judgment was confessed on the 22d day of May, 1856, for \$90, with interest from the 4th day of October, 1851, and costs \$5.33½.

The court below (Nill, P. J.), after stating the case, charged the jury, that the "judgment against the plaintiff was entered to cover a certain claim attached for goods sold, and when such goods were sold the judgment was to be satisfied. The plaintiffs say this money has been paid, and that the money was paid into

Lien.

court in Alleghany County, Maryland, in 1854, to satisfy said judgment. From my recollection of the testimony, the sum paid into court was \$150. The plaintiff has produced the depositions of S. M. Semmes and James Reynolds, which it is alleged proves the payment of said judgment. There is a discrepancy in the dates. The money was paid into court in 1854, and the judgment confessed on the 22d of May, 1856. In the process of attachment, if such process in Maryland is conducted as such cases are in Pennsylvania, there is generally more delay than in common actions. We submit the testimony to you to find whether said judgment was paid, or provision made for its payment at the time the insurance was given, on the 12th September, 1856. If the judgment was no incumbrance, and did not mislead or deceive the insurance company when the policy was issued, your verdict should be for the plaintiff for the amount insured.

“ If, from the evidence, you should conclude that this judgment was satisfied at the time the policy was issued, and that McAnally, in his answer, were mistaken as to this incumbrance, but that such mistake did not deceive the defendants as to the character of the risk, your verdict should be for the plaintiff. The deceit practised by the insured as to the risk should be considered, in a reasonable manner ; a small judgment for \$20 or \$30, or even \$100, which was an incumbrance on the lot, we submit it to you to say whether it would be such a deception as would affect the character of the risk. If you believe that it would not affect the risk, that is, if such an answer would not endanger the payment of the assessment on the premium note, or the payment of the premium note itself, then the verdict should be for the plaintiff.

“ We answer the points of the plaintiffs as follows : The judgment of condemnation on an attachment would, we presume, bind the real estate of McAnally as a lien.

“ 2d. If the money was paid into court, it would be substantially a payment of the judgment, to be appropriated to the claims of the attachment, under the directions of the court of Alleghany County, Maryland.

“ If the defendants have not made out from the evidence, satisfactorily to you that this property was so incumbered by the judgment referred to as to deceive the company as to the character of the risk, their defence has failed, and the finding should be for the plaintiff.”

Lien.

There was a verdict and judgment for the plaintiff. Whereupon the defendant sued out this writ, and assigned for error the instructions given to the jury as above stated.

The opinion of the court was delivered by

WOODWARD, J. The only question in this case is, whether the policy was avoided by the answer of McAnally, that there were no liens upon the property insured. The policy was dated 12th of September, 1856; the property insured was situated in Maryland, and a record of the circuit court of Alleghany County, in that state, was given in evidence to show that on the 22d May, 1856, McAnally had confessed a judgment for \$95 in a suit of attachment by one Henry B. Martin against him. Was this judgment a lien upon the property insured? It appears, by the record, that Henry B. Martin had obtained a judgment against John Martin, whose goods and chattels had been sold by McAnally as constable, on some other process. To get at the moneys in McAnally's hands, arising from the sale, Henry B. Martin attached McAnally, who confessed a judgment for the above amount, the plaintiff's counsel stipulating in writing at the time that he had "agreed with defendant's counsel not to extend the judgment beyond the proceeds of sale realized by, and due on promissory notes to James McAnally, for the goods and chattels of John Martin, sold by him as constable under various executions, issued in certain attachment cases, which were appealed from, and afterwards reversed."

There was evidence that the funds realized by sale of John Martin's effects had been paid into court in 1854, and some evidence that all the money going to Henry B. Martin had been paid him. But however this fact was, it is certain that the judgment against McAnally extended to nothing beyond these funds. Under the laws of Maryland a general judgment in an attachment suit would have been a lien on McAnally's real estate, and he would be bound to disclose it to the insurance company in obtaining a policy on that property, but the lien of this judgment was limited, and did not extend to the property insured. There was no fraud, therefore, in failing to disclose it. There was not even an inaccuracy of statement. He said there was no lien on what he wanted to insure, and the record produced by the company failed to show that there was any. It is not worth while to consider the verbal criticisms of the charge, for, however just they

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may be, the only ground of defence set up by the company failed them so entirely that it was very right to render judgment against them.
The judgment is affirmed.

COMSIN vs. PENNSYLVANIA INSURANCE CO.¹ (Supreme Court, Pennsylvania, 1863.) *Insurable Interest. — Judgment. — Waiver of Condition.*

The record of proceedings in the circuit court of Illinois in equity, under which the legal title to real estate was decreed to the equitable owner, was held admissible in an action on an insurance policy as evidence of the existence of an insurable interest in the party insured at the date of the policy, although the proceedings were not commenced until after the loss had occurred on which the action was founded.

A limitation or condition in a policy of insurance intended for the benefit of the corporation may be waived by it, and the fact of waiver is a question for the jury.

LONDON INVESTMENT CO. vs. SIR MOSES MONTEFIORE.² (Common Bench, January, 1864.) *Assignment.*

Where a policy of fire insurance has been assigned, the insurers, in the absence of an express contract to do so, are not bound, upon the application of the assignee, to pay him upon the policy.

PEORIA MARINE AND FIRE INSURANCE CO. vs. REUBEN S. HALL.³

(Supreme Court, Michigan, January Term, 1864.)

Insurance by one Part Owner. — Limitation Clause. — Gunpowder. — Waiver.

If one partner insure the partnership property against loss by fire in his own name only, and it does not appear that the insurance was really intended for the benefit of the firm, the premium paid from the partnership funds, and the transaction subsequently ratified by the other partner, the policy will cover only the undivided interest of the partner insuring.

It makes no difference in this respect that the agent of the insurer knew the interest of the parties, and that it was the intention of both the insurer and insured, at the time of issuing the policy, that the insurance should cover the whole.

The rule may be otherwise where the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien on the goods insured.

Where a policy when made covers the interest of one partner only, the remaining interest cannot be brought within it by the partner insured subsequently becoming the owner of the whole.

By one of the conditions attached to a fire policy, it was provided that no suit should be brought upon it unless within twelve months next after the loss; and in case any suit should be commenced after the expiration of twelve months, the lapse of time should be deemed and taken as conclusive evidence against the validity of the claim. It was held that if such a condition was valid at all, it was valid as a contract only, and that the limitation fixed by it must, upon the principles governing contracts, be more flexible in its nature than one fixed by statute, and liable to be defeated or extended by any act

¹ 46 Penn. St. 323.

² 9 L. T. N. S. 688.

³ 12 Mich. 202.

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of the insurer which prevents action being brought within the prescribed period. *Held*, further, that the insured had the whole of the twelve months within which to commence suit, and that the limitation must rest upon the tacit condition, without which it could not be valid, that the insurer should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close to enable the insured to commence his suit in the ordinary legal mode.

And process having been issued before the expiration of the twelve months, returnable two days after their expiration, and no agent of the insurer — a foreign corporation — being found in the county, upon whom to make service, and new process being issued on the return of the first, it was *held* that the failure to commence suit within twelve months was sufficiently excused, and the second suit, under the circumstances, was brought in season.

Where by a fire policy it was provided that the keeping of gunpowder "without written permission in the policy" should render the policy void, it was *held* that if the agent taking insurance on a stock of goods knew that gunpowder was kept and to be kept, the keeping it would not render the policy void, whether permission to keep it was indorsed or intended or neglected to be indorsed or not.

Notice of this fact to the agent was notice to the principal, and by taking the premium and issuing the policy, the insurer must be regarded as having waived the condition which prohibited gunpowder being kept.

ERROR to Washtenaw Circuit, to which the case had been transferred from Jackson. All the material facts appear in the opinion.

CHRISTIANCY, J. This was a suit brought by Hall against the company, upon two policies of insurance against loss by fire: one upon a stock of goods in plaintiff's store in the village of Hamburg, Livingston County, Michigan, to the amount of two thousand dollars, dated January 13, 1860; and the other for a like amount in the aggregate, upon plaintiff's dwelling-house, furniture, clothing, barn and shed, hay and grain, and on his store (building) there situate, the amount insured upon each item being specified; that upon the store building being one hundred and fifty dollars. This policy is dated August 9, 1859.

The policies on their face are declared to be "made and accepted in reference to the conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties in all cases not therein otherwise specially provided for." By the eighth condition annexed, it is declared (among other things), that "the keeping of gunpowder or fireworks, for sale or on storage, upon or in the premises hereby insured, or in any building containing property insured by or under this policy, without written permission in the policy, shall render it void, and of no force or effect."

The seventeenth condition is in the following words: "It is

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further hereby expressly provided, that no suit or action against said company, for the recovery of any claim under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur: and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim so attempted to be enforced."

It was proved on the trial by the plaintiff below, who was sworn as a witness in his own behalf, and the fact was undisputed, that at the time of the application for insurance of the goods, and at the date of the policy (January 13, 1860), one Helam Bennett was a partner of the plaintiff in business, and, as such, was the owner of the undivided half of the goods insured, and continued to be such partner and owner until the 14th day of March, 1860, when the plaintiff bought out his interest.

There was evidence tending to show (as to the policy on the goods) that King, the agent of the company, came to the store and wanted to insure the goods; that plaintiff signed the application for the policy, which was mostly blank when signed; that some one came in, and King turned around and said plaintiff could sign it, and he (King) could fill it out; that plaintiff told King he usually sold gunpowder and everything usually sold in a country store, and that he intended to do so. And (in reference to the policy on the store) there was evidence that, at the time the insurance was taken, the keeping of gunpowder was talked over with King, the agent, and he was told they had gunpowder in the store, and was asked if it would make any difference if powder was kept for sale; to which King replied, "No."

There was also evidence that plaintiff, at the time of the application for the insurance on the goods, told the agent he did not think he (plaintiff) had a right to insure Bennett's share, and that King replied it would make no difference; that plaintiff had a right to insure the whole.

The fire occurred on the 31st day of March, 1860, by which the store building and the stock of goods were destroyed.

The circuit judge charged the jury that "if the agent, King, at the time of making the policy on the goods, knew the interest

of the parties — that they were jointly owned by the plaintiff and Bennett — and insured the whole stock, the policy would be valid for the whole stock insured." To this charge exception was taken, and this presents the first question we shall consider.

It is evident from the language of this charge that it was intended to instruct the jury that if the agent, at the time of making the policy, knew the interest of the parties, &c., the policy would be valid for the whole amount of the interest of both partners, and that the plaintiff was entitled to recover in this action the whole amount of the loss of all the goods, though his interest at the time of the insurance was but one half, and though the insurance was in his name alone, and his declaration averred that, "at the time of making said policy, and from thence until the loss, &c., he was the owner of said property insured by said policy, and of the value, and to the amount, by the said defendant insured thereon."

Without attempting to decide what might have been the rule of law, had it appeared from the evidence that the insurance was really intended for the benefit of the firm, the premium paid from the partnership fund, and the transaction subsequently ratified by the other partner; we think where (as in the present case) there is no evidence of this kind, and its whole tendency is the other way, the rule is well settled, in reference to a fire policy like this, that if one partner, or part owner of property held in common, insure in his own name only, the policy will cover his undivided interest, *and no more.* *Graves v. Boston Marine Ins. Co.* 2 Cranch, 419, 440; 8 Kent (5th ed.), 258; 2 Duer's Ins. §§ 20 and 24; *Finney v. Bedford Com. Ins. Co.* 8 Metc. 348; *Finney v. Warren Ins. Co.* 1 Metc. 16; *Pearson v. Lord*, 6 Mass. 81; 1 Phil. on Ins. 219, § 391; 1 Arnould on Ins. 146, and note. The rule may be otherwise when the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien on the goods insured. 2 Duer on Ins. §§ 19 and 24; *Milliandore v. Atlantic Ins. Co.* 8 La. 557.

We do not see how the agent's knowledge of the interest of the parties, nor his belief or assurance that Hall had the right to insure the whole, can affect the question, so long as the insurance was not in fact made on the account, and for the benefit, of the firm. One partner cannot, by reason alone of his interest as such, insure in his own name, and for his own benefit, the interest

of his copartner in the partnership stock. And, though such may have been the intention both of the assured and of the company, on entering into the contract, the policy, in legal effect, can operate only as an indemnity against loss to the extent of the plaintiff's undivided half of the goods. And if the policy, when made, did not cover the other partner's undivided half, that portion would not be brought within it by the plaintiff's subsequent acquisition of the property from such other partner. The charge was therefore erroneous, and as the verdict of the jury, in accordance with the charge, was for the whole amount of the goods, the judgment must be reversed upon this ground. But, as there is to be a new trial, we think it proper to indicate our opinion upon the two other questions raised in the case.

It was objected by the defendant below, that the action was not brought within the period of twelve months after the loss, according to the seventeenth condition attached to the policy. It appears from the bill of exceptions that a summons was issued in the cause March 18, 1861 (thirteen days before the expiration of the twelve months), returnable on the 2d day of April, 1861; that, on the 8d day of April, 1861, the sheriff made a return upon the said summons that defendant could not be found in his bailiwick; that on the next day another summons was issued with which defendant was served, nothing appearing on this summons showing it to be a continuation of the first, except the word "*alias*" written by the clerk upon the face of the seal.

We do not deem it necessary to discuss the question whether this second summons, as an "*alias*," operated strictly as a continuation of the first, so as to save a right of action against a statute of limitations which had run upon it in the mean time; nor do we think it necessary to determine the validity of this species of limitation by contract. If valid at all, it was valid *as a contract*, and *not as a statute*. A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse for delay beyond the period fixed, unless such excuse be recognized by the statute itself. But a limitation by contract (if valid) must, upon the principles governing contracts, be more flexible in its nature, and liable to be defeated or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period. The plaintiff had the whole of the twelve months in which to bring his suit; and it was as competent for him to

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institute it on the last as the first, or any intervening day. And the fundamental idea, the tacit condition upon which such a limitation must rest, and without which it could not be tolerated for a moment, is, that the defendant should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close, to enable the plaintiff to commence his suit against him, by the service of process in the ordinary legal mode; otherwise the defendant would be enabled to take advantage of his own wrong, and, by absenting himself, entirely to defeat the plaintiff's right of action.

The defendant in the present case was a foreign corporation, doing insurance business in this state. By the act of February 15, 1859, full provision was made for bringing the action within the state; and the company, before doing any business in the state, were required to file in the office of the secretary of state a resolution consenting that service of process may be made upon any agent of the company. Nothing is said in the case upon what agent the service of the second summons was made; but it must have been made upon some agent of the company. It does not appear whether there was an agent in the county of Jackson, or in any other particular county. It appears that S. S. Brown was the general agent of the company for this state, and that Knight was also an agent, but neither their residence nor place of business is stated. From anything which appears in the case, the plaintiff was as much at liberty to bring his action in Jackson as in any other county, so far as the residence of an agent could have any bearing, if, indeed, it could have any under the law; and if an agent of the company resided in Jackson County, the action was certainly very properly brought there.

All that was necessary for the plaintiff to do, to excuse the delay beyond the twelve months, was, to take the proper and usual means for instituting his suit, and getting service of process within the limited period, which he did by issuing a summons thirteen days before the expiration of that period, returnable two days after it had expired. The return shows that no service could be had during that time. We can see no possible ground for imputing any want of good faith to the plaintiff in his endeavor to get the process served in time. Upon the facts stated in the case, therefore, it appears to have been the fault of the defendant

— the absence of an agent — that the first summons was not served, and the action commenced within the twelve months; and this is sufficient to defeat the limitation or extend it till the service was made under the second summons, which was issued immediately on the return of the first.

As to the condition in reference to the keeping of gunpowder, there was evidence from which the jury were authorized to find that the agent knew it was kept at the time, and was to be kept after the insurance, and that he assented to it, and induced the plaintiff to believe that it would make no difference.

Upon this point the court charged, that “if plaintiff informed the agent that he kept gunpowder in his store for sale, and the agent intended to insure against keeping it, but neglected to indorse the permission on the back of the policy, such neglect would not make the policy invalid.” The condition did not provide for any *indorsement* of this kind upon the policy, but the keeping of gunpowder was to render the policy void “without written permission in the policy.” To this extent the charge was inaccurate, yet we do not think it can be treated as error of which the company can complain; since, we think, the plaintiff was entitled to a still stronger charge in his favor. He would have been entitled to a charge that if the agent knew it was kept, and to be kept, the keeping it would not render the policy void, whether the permission was indorsed or intended or neglected to be indorsed or not.

But the counsel for the plaintiff in error insists that the printed condition was notice to the assured of the agent’s want of authority to assent to the keeping of gunpowder, &c., and that this assent could be given only by the company itself. This, at first view, would seem plausible, and might be sound, but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to his principal. The company must be regarded as knowing what he knew. If he knew that powder was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition; and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to receive the premium

False Swearing.

for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss. *Bidwell v. Northwestern Ins. Co.* 24 N. Y. 802; *Frost v. Saratoga Mutual Ins. Co.* 5 Denio, 154; *Masters v. Madison Co. Mutual Ins. Co.* 11 Barb. 624; *Campbell v. Merchants' & Farmers' Mut. Ins. Co.* 87 N. H. 85; *Marshall v. Columbian Ins. Co.* 27 N. H. 157; *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio (N. S.) 452; *Howard Fire Ins. Co. v. Bruner*, 23 Penn. 50; *Clark v. Union Mut. Fire Ins. Co.* 40 N. H. 883. See Angell on Ins. § 470.

We see no error in the record or proceedings in the court below, except that in reference to the interest of the plaintiff at the time of the insurance. For this error the judgment must be reversed, with costs in this court, and a new trial granted.

FITZSIMMONS vs. CITY FIRE INSURANCE CO.¹ (Supreme Court, Wisconsin, January, 1864.) *Ratable Adjustment of Loss.*

In the case of property covered by several policies which are to respond ratably, the liability of one company is not affected by the fact that another has more than paid its ratable share. Nor can the latter claim contribution from the rest for the excess paid.

TAUNTON vs. ROYAL INSURANCE CO.² (Coram Vice Chancellor Page, English Court of Chancery, February, 1864.) *Payments ex gratia. — Ultra Vires. — Policy. — Explosion.*

Directors of an insurance company offered to pay losses caused by a gunpowder explosion, although their policies contained an express exception of such losses, at the same time not admitting any legal liability to do so. On a bill by a shareholder to restrain the payments, it appearing on the evidence that it was usual and advantageous for companies to make such payments, although not strictly bound to do so; *held*, that this was a mode of carrying on the business with which the court could not interfere, and the bill was dismissed with costs.

JAMES MARION, respondent, vs. THE GREAT REPUBLIC INSURANCE CO., appellant.³

(Supreme Court, Missouri, March Term, 1864.)

False Swearing.

The usual provision as to false swearing refers to false statements as to material matters wilfully made, with intent to deceive.

THE case is stated in the opinion.

BATES, J. This is a suit upon a policy of insurance of a stock of goods in a store in St. Louis. The policy required the assured,

¹ 18 Wisc. 234.

² 2 Hem. & M. 135.

³ 35 Misso. 148.

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on sustaining loss or damage by fire, forthwith to give notice thereof to the company, and as soon after as possible to deliver in a particular account of his loss or damage, signed with his own hand, and verified by his oath or affirmation. The policy also provided, that if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy. The answer set up, that after the loss the plaintiff had given the defendant a false and fraudulent account of his loss and damage, whereby the defendant was discharged from liability. At the trial, evidence was given tending to prove that the statement of loss made to the defendant by the plaintiff, and sworn to by him, was false in material matters.

At the instance of the defendants, the court gave the following instruction : —

“ If the jury believe from the evidence that the plaintiff made and subscribed the affidavit dated April 10, 1860, read in evidence, and delivered the same to the defendant as containing a statement of his actual loss and damage by the fire in question ; and if they further believe from the evidence that his said loss and damage was materially less than would appear by said statement, and that plaintiff knew this fact when he made and subscribed said affidavit, then the plaintiff cannot recover.”

And the court refused the following instruction : —

“ If the jury believe from the evidence that the plaintiff made the affidavit of 10th April, 1860, and that at the time he made it he did not know the amount of stock on the first floor and cellar of the store therein mentioned ; if at said time plaintiff knew that he did not know such amount, then he has been guilty of false swearing, within the intent and meaning of the policy, and in that case plaintiff cannot recover.”

There was verdict and judgment for the plaintiff, and the defendant appealed.

The only error complained of is the refusal to give the instruction above copied. The affidavit referred to stated that the value of his stock of groceries, produce, and merchandise, contained in first floor and cellar of store No. 89 South Main Street, in the city of St. Louis, and which were on hand the day previous, and at the time of the fire, was \$7,180.22.

The counsel for the appellant treats the instruction which was refused as if it differed from that given in one respect only ; that

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is, in that the statement was of a matter of which the affiant was ignorant ; while in the instruction given, the statement was of a matter which the affiant knew to be false. If that were so, I would have no hesitation in reversing the judgment ; but the instruction is fatally defective in another respect ; that is, that it does not require that the false swearing should have been done with an intention to deceive the defendant, or get an advantage of it. The clause in the policy in respect to false swearing is to be viewed in connection with all the other parts of the policy, and the general nature of the contract ; and so viewing it, it is obvious that it was intended thereby to require the insured to give the insurer real and reliable information as to the amount of the loss, and that a mistake or unintentional error, or misstatement of an immaterial matter in the sworn statement, would not avoid the policy ; but the false statement must be wilfully made in respect to a material matter, and with the purpose to deceive the insurer. Now this instruction requires that the false statement (that is, the statement made in ignorance of its truth) shall have been knowingly made, but does not require that the jury shall find that it was in respect to a material matter, or made with an intention to deceive the defendant. It might probably be inferred that the matter was material ; but under that instruction, if given, the jury would have been required to find for the defendant, notwithstanding that the false statement was not intended to deceive the defendant, and did not deceive it, and that the plaintiff derived, and could derive, no advantage from it ; and the defendant received, and could receive, no detriment from it. *Hoffman v. Western Marine & Fire Ins. Co.* 1 La. 216.

No doubt an indictment for perjury might be supported by proof of a swearing to the truth of matters of which the accused was ignorant (and which might in fact be true), but the prosecution for perjury is distinctly for the offence of false swearing, irrespective of the effect of the falsehood ; whilst here, the clause as to false swearing is a part of a contract between two persons, and is important only in its effect, actual, presumed, or intended. It is no part of the intention of the parties to punish one of them for an immoral or illegal act ; but the provisions of the contract have reference only to their interests in respect to the subject matter of the contract. And if it be true that the plaintiff had on the first floor and cellar of his store the precise amount of

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merchandise, groceries, and produce, so particularly mentioned in his statement, the defendant could not have been injured by the statement, notwithstanding that the plaintiff was wholly ignorant of the amount of merchandise, &c., which he had, and was guilty of the moral offence of false swearing.

There was no error in refusing the instruction.

Judgment affirmed.

LIDDLE vs. MARKET FIRE INSURANCE CO.¹

(Court of Appeals, New York, March, 1864.)

Renewal. — Increase of Risk. — Notice. — Waiver.

Although an insurance policy contains a condition that insurances are deemed made on the representations of the applicant, and renewals shall be deemed made under the original representation in so far as it might not be varied by a new one in writing which the insured should make in all cases where the risk had been changed; and that if before a renewal the risk had been increased, and the insured failed to give information thereof, the renewal should be void; yet if no written representations were made by the applicant when the policy was issued, but the company took the risk on the report of their surveyor, oral information of an increase in the risk is sufficient if it is received and a renewal is granted thereon. And the act of issuing a renewal without objecting to oral notice is a waiver of the requirement of written notice.

WRIGHT, J. If the exceptions raise any question to be considered, it is but a single one. The policy covered the plaintiff's stock, &c., in the *westerly* end of a building, some one hundred and twenty feet in length, known as City Central Hall, in Brooklyn. The plaintiff occupied the store in this building, cornering on Fulton Avenue and Elm Place. Intermediate the first and second renewals of the policy a steam bakery was introduced into the *easterly* end of Central Hall. On the trial the plaintiff testified, that, upon calling at the defendants' office to have his policy renewed the last time (having received notice from the company that it was about expiring), he informed their secretary verbally of the erection of the bakery. The question eliciting this testimony was objected to, on the ground that all notices of increased risk were required to be in writing; and after the evidence was in, and the plaintiff had rested, a nonsuit was moved for, on the ground "that no written representation as to the increased risk had been made to the company, or consent therefor indorsed on the policy." Again, at the close of the case, the court was requested to charge, that if the jury believed that at the time of the renewal of the policy the risk to the building had been increased

¹ 29 N. Y. 184.

by the fact of the steam bakery having been put in, they should find for the defendants, as no evidence had been given that a written statement of that fact had been made to the company." The point, therefore, sought to be raised was, that the risk being increased by the use of the neighboring premises, the plaintiff was required, by his contract of insurance, to give notice to the company in writing of the fact at the time of the application for the second renewal of the policy; and having omitted to do so, such renewal was wholly void, and evidence of a verbal communication inadmissible. It was not that the evidence offered was insufficient to justify the submission of the question of waiver of written notice to the jury, but that a written statement by the plaintiff of the changed risk was an indispensable prerequisite to the renewal taking effect. It is true that the defendants excepted to the instruction of the judge, that if the plaintiff did fully and fairly communicate the fact of the increased risk (if it were one), and no objection was made to the communication not being in writing, the plaintiff's right to recover would not be defeated by reason of such communication not having been made in writing. This, however, was in substance an instruction that the company might waive a strict compliance with the condition; and if the plaintiff verbally gave full information of the increased risk before the renewal, and no objection was made that the information was not in writing, but the company renewed the policy after such notice, they waived a strict compliance, and could not afterwards insist in bar of the action that the notice should have been written and not verbal. The exception did not reach the point now mooted, that the evidence did not justify the submission of the question of waiver to the jury, and that the secretary of the company had no right to waive any of the formal requirements of the policy.

The only question, then, that can be claimed to have been raised by the exceptions is this: whether (if the risk was increased by the erection of the bakery) the omission of the plaintiff to give written notice to the company of the fact, at or before the last renewal of his policy, absolutely barred his right to recover.

It will not be pretended that any obligation rested on the insured to inform the company, in writing, of the erection of the bakery, unless imposed by the contract of insurance. If it were

a condition of the contract that he should do so, and there was no waiver by the company, a failure to strictly comply would render the policy and the renewal void and of no effect. Conceding, then, that setting up the bakery in the easterly end of Central Hall increased the risk, a primary inquiry is whether the plaintiff's contract bound him to give written information to the company of the fact, at or before the time such contract was renewed in December, 1856. I am inclined to think that it did not. The first condition annexed to the policy provided that insurances on property, out of the cities of New York and Brooklyn, were to be made upon the written representations of the applicant as to the nature, construction, and materials of the building containing the property to be insured; its situation with respect to contiguous buildings, their construction and materials, and whether any manufactory was carried on within or about it; and in relation to the insurance of goods, whether they were of the description denominated hazardous, extra hazardous, or included in the memorandum of special rates. The twelfth condition provided that insurances once made might be renewed, and that all insurances, original or renewed, should be considered as made under the original representation, in so far as it may not be varied by a new representation, in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings. It is obvious that this provision relates to a case where the property is insured upon the written representations of the applicant. The provision is that insurance, original or renewed, is to be considered as made under the original representation of the party insured, in so far as it may not be varied by a new representation, in writing; and if the risk has been changed, either within itself or by the surrounding or adjacent buildings, intermediate the issuing of the original policy and the application for renewal, it is made incumbent on the party making the original representation in writing to make a new one in the same form. This is all that was intended to be provided for, and the reason therefor in this particular case is plain. The risk is taken upon the representations of the insured, which amount to a warranty as to the actual nature and situation of the thing insured. When taking or renewing the risk the company rely upon the representations, and not upon any report of their

own surveyors, and any misrepresentation or concealment of matters required by the terms of the policy to be fully and truthfully stated, would be a breach of warranty and avoid the insurance. The plaintiff's insurance was on property in Brooklyn, and it is conceded that there was no representation in writing when the policy was issued, and that the risk was taken on the report of the company's surveyor. There was, in his case, no original representation in writing, or no new representation to be made in the same form, in case the risk had been changed either in respect to the kind of property insured or its situation as to surrounding or adjacent buildings. I think the first clause of the twelfth condition requiring the party insured, upon a change of risk as specified therein, to make "a new representation in writing," has no application to an insurance on property in the city of Brooklyn, when it is conceded that the insurance is effected not upon any written representations of the insured, but upon a survey by the company itself. In the latter case, the company assumes the risk upon its own survey, without any representation of the assured. The insurance is not to be deemed made in pursuance of *his* representations; and if the risk be varied, it is not a fair construction of the clause in question that it requires him to make any representation whatever as to the nature of it. It is the *change* of the original risk, either in the description of the insured property, or from its situation to contiguous buildings, or the uses those may be put to, on which to base the contract of insurance, that the clause requires to be stated in writing; and as to these matters, in insurances on property in Brooklyn, the company relies on its own survey. It is, of course, important in all cases that the company should be informed, before a policy is renewed, of any *increase* of risk intermediate the issuing of the policy and the renewal, by the use or occupation of the premises insured or of the neighborhood premises; and this is stipulated for in the last clause of the twelfth condition. It is provided that if the assured shall fail to give information of an increase of the risk by the erection of buildings, or by the use or occupation of the premises insured or of the neighboring premises, the policy and renewal shall be void and of no effect. This, however, is not a stipulation that the assured shall give written notice. Indeed, in insurances on property in New York or Brooklyn, where the company make their own surveys, a verbal notice that neighbor-

ing premises were being used in such a way as would be likely to increase the risk, is all that could be reasonably required. The object is to give the company information of erections intermediate the issuing of the policy and its renewal, so that they may resurvey the premises before determining upon issuing the certificate of renewal. When the company is its own surveyor, and makes or renews insurances upon surveys made by itself, the object in view is attained as well by a verbal as a written notice. The attention of the company is directed by either form of notice to what may increase the risk and call for a further survey, before renewing the policy. For any of the purposes of the parties, a written is no better than a verbal notice. Had the plaintiff, in this case, instead of stating verbally that the bakery had been put into the eastern end of Central Hall, stated the same fact in writing, the paper would not have gone on the files of the company; or if it had, it would not have concluded either party. The question whether there had been a failure on the part of the assured to comply with the last clause of the twelfth condition of the policy would still have been an open one.

I think, therefore, there was nothing in the plaintiff's contract of insurance that bound him to give written notice at the time his policy was renewed, that the bakery had been put in the easterly end of the building known as the City Central Hall; that, in his case, the omission to give notice of the fact in written form was no breach of any warranty; and that the stipulation for notice, at or before renewal of an increased risk occasioned by the use or occupation of neighboring premises, was satisfied by an oral communication of the fact to the company.

But if this is an erroneous construction of the provisions of the policy, and the twelfth condition required the plaintiff to give information in writing of the erection of the bakery, there is no doubt the company might waive a strict compliance. This is not questioned by the defendants' counsel. They could waive any condition of the contract in their favor. One of the conditions of this contract was, that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium; but there is no doubt that giving credit for the premium by the delivery of the policy without payment would be a waiver of the condition. It is said that the evidence was not of the character required to constitute a waiver, but no such

point was distinctly raised at the trial. The ground taken — and the only one — was, that under no circumstances could the plaintiff recover if the jury believed that at the time of the last renewal of the policy the risk of the building had been increased by the fact of the steam bakery having been put in, he having omitted to make a written statement of that fact to the company. I think the judgment should be affirmed.

HOGEBROOM, J. The case presents three exceptions for consideration. 1st. To the admission of parol evidence of notice of the increased risk. 2d. To the refusal to nonsuit for the want of a *written* representation as to such risk. 3d. To the charge and refusal to charge.

The parol evidence was, I think, properly admitted ; as, independent of the question whether a written representation was necessary by the terms of the policy, it would be proper to show a *waiver* of such representation by the acts of the parties, and the testimony tended in that direction. The direction upon the card to “renew and resurvey ;” the express request for renewal ; the explicit communication of the erection of the bakery ; the request to the defendants to examine the premises ; the secretary’s promise to send the company’s surveyor to examine the premises ; the subsequent renewal of the policy in the light of all this information, constituted together a body of testimony which was admissible on the question of waiver.

The same testimony, as yet unexplained or uncontradicted, furnished a sufficient reason for refusing the motion for a nonsuit, and for subsequently refusing a peremptory instruction to the jury to find for the defendants on account of the omission to communicate *in writing* the fact of the increased risk, in case they should find such increased risk existed.

The more serious difficulty arises on the charge of the judge that a full and fair verbal communication by the plaintiff to the defendants of the facts constituting the increased risk, if not objected to on the ground that it was not in writing, was, in effect, a waiver of a written communication.

I think a charge in so direct and unqualified a form was error, but did not prejudice the defendants, for reasons to be hereafter stated. The parties had taken pains, by the terms of their contract, to require a written statement of the facts constituting the increased risk. There were reasons for such a requisition and

mutual protection arising from the frailty and unreliability of oral evidence; and the provision ought not to be regarded as intentionally dispensed with, except upon clear proof of facts constituting an express waiver, or inconsistent with an enforcement of this condition of the contract. There may have been — I think there were — facts on which the plaintiff could properly ask to go to the jury on the question of waiver, and the omission to call for a communication in writing was one. But such omission was not, I think, standing by itself and alone, to be regarded, as the judge in effect instructed the jury, necessarily sufficient and conclusive of an intent to waive a written statement of the facts constituting the increased risk.

The plaintiff's counsel attempts to sustain the decision of the court below by insisting not only that here was ample evidence of a waiver, but also by insisting 1st. That the contract did not, in the present instance, require a *written* representation. 2d. That a failure to comply with that condition of the contract did not avoid the policy. These suggestions are not without force.

The twelfth condition, on which the question arises, declares that all insurances, whether original or renewed, shall be considered as made under the *original representation*, unless varied by a new representation in writing, which new representation it shall be incumbent on the party insured to make in all cases where the risk has been changed.

Now there is nothing in the case which shows that the original insurance was effected by means of any original representations in writing, or any original representations whatever. It may be that it was procured, as was allowed by the conditions of insurance as to all property in New York and Brooklyn, upon a simple request for that purpose, accompanied by the examination and survey of the defendants' own officers; and that it was upon the latter alone that the defendants relied when they issued the policy. If so, then the renewed policy would stand upon the same basis, except that the insured would have been guilty of a non-compliance with this clause of the contract in not making a statement in writing of the circumstances producing a change of the risk. It is nowhere stated that such non-compliance, by omitting to make a statement *in writing*, shall avoid the policy; nor was it so intended, as will presently be seen by examining the next succeeding clause in the twelfth condition. Hence there

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was no fraud, misrepresentation, or breach of warranty upon which the defendant could avoid the policy.

But there is a further clause, as the plaintiff contends, and I think properly, which declares what in reference to this subject shall avoid the policy and its renewal, and it is this: If at or before the time of the renewal the risk has been increased and the assured shall fail to *give information thereof*, said policy and renewal shall be void and of no effect. This information need not be communicated in writing; the terms of the policy do not require it. The verdict of the jury has substantiated the fact that it was verbally given, and hence the policy remains in force.

It is suggested that the policy became void under the fifth condition, which requires all previous or subsequent insurances to be indorsed on the policy, or otherwise acknowledged in writing; and that as an additional insurance had been effected by the plaintiff, at a higher rate of insurance for the *increased risk*, and such increased risk had not been noted on the plaintiff's policy, it became void. But there is nothing in the fifth condition which requires either the *rate of insurance*, or the *increase of the risk* in another company, to be indorsed or acknowledged on the policy. It appears to be sufficient, as was done in this case, to note the fact and amount of such additional insurance; the object being to make a proper distribution of the amount of the loss between the two companies.

While, therefore, the court below erred in the reason given for the conditional instruction given to the jury in regard to the plaintiff's right to recover, to wit, a waiver of a written communication as to the increased risk by not objecting to a verbal notice, yet inasmuch as the substance of the instruction was correct, to wit, that the plaintiff's right to recover would not be defeated, provided he fully and fairly communicated to the defendants the fact of the increased risk, though not in writing; I see no reason for disturbing the judgment of the court below, and am of opinion that it should be affirmed.

All the other judges concurring,

Judgment affirmed.

See same case in 4 Bosw. 179.

Proofs of Loss. — Waiver.

PEORIA MARINE AND FIRE INSURANCE CO. *vs.* HERVEY *et al.*¹
(Supreme Court, Illinois, April Term, 1864.) *Action. — Parties.*

Assumpsit lies by the assignee of a policy upon the issuance of a renewal receipt to him after the assignment and the payment of premium on the renewal by him.

BIRMINGHAM *vs.* EMPIRE INSURANCE CO.² (Supreme Court,
New York, June, 1864.) *Building as a Chattel. — Insurable Interest.*

One who has insured a building without stating it to be as a chattel will not be permitted to show that it was such, where the contract provides that "the nature of the title, if less than a fee simple," shall be stated.

The plaintiff had possession of the property insured by virtue of an agreement to convey upon the payment of a certain sum in equal annual parts, the vendor having the right to rescind in case of failure. The first payment due was not made, and the vendor rescinded and the plaintiff left the premises. *Held*, that his insurable interest was terminated.

WILLIAM ROACH *vs.* NEW YORK AND ERIE INSURANCE CO.³
(Court of Appeals, New York, June, 1864.) *Limitation Clause.*

The clause in an insurance policy limiting the time within which actions shall be brought is valid.

CORNELL *vs.* MILWAUKEE MUTUAL FIRE INSURANCE CO.⁴
(Supreme Court, Wisconsin, June, 1864.)

Proofs of Loss. — Waiver.

A defect in the certificate of loss *held* not waived by a general objection to the document.

THE case is stated in the opinion.

COLE, J. The objection that notice of the loss was not given in this case, as required by the policy, seems to us insurmountable. It is a plain condition of the contract, that, "in case of any loss or damage by fire happening to any member, upon property insured in and with said company, the member shall give notice thereof in writing to the secretary of said company, within twenty days from the time such loss or damage may have occurred." It appears to us that it is utterly impossible to say, in view of the acts of the assured, that there was ever a substantial compliance with this stipulation in the contract. The first written notice sent to the secretary or officer of the company bore date the 11th of February, 1862, when the loss occurred on the 5th of the previous month. It is true, in this written notice the assured

¹ 34 Ill. 46.

² 42 Barb. 457.

³ 30 N. Y. 546.

⁴ 18 Wisc. 387.

Proofs of Loss. — Waiver.

stated that she had given the company notice of the loss on the 7th and 31st of January, through John Scott, an agent of the company. And on the trial, after a motion of nonsuit had been made and granted, the appellant offered to prove that John Scott was the agent of the company who effected the insurance, and continued such agent up to the time of the loss, and that the assured notified him of the loss as stated in the notice of the 11th of February. Assuming that these facts had been firmly established before the nonsuit was granted, we still think the result must be the same. For it can hardly be said that notifying a local agent of a loss is any compliance with a condition which requires that notice shall be given to the secretary of the company. The local agent had no authority to receive notice of loss, and therefore notice to him was not notice to the company. It is said that the requirements of a written notice of loss to "the secretary" need not be strictly complied with, but that notice of the loss, whether written or verbal, given to the secretary, or other officer in charge of the affairs of the company, or left at the office, is all that is necessary. It is possible such a notice might be deemed a substantial compliance with the condition that written notice be given to the secretary. We are certainly not inclined to adhere to any literal or technical construction of such stipulations. It is the duty of courts, undoubtedly, to give them a fair and reasonable interpretation. At the same time, we should be going farther than authority or principle would warrant, to hold the notice of loss which was given in this case sufficient, or a substantial compliance with the terms of the policy. It was not given within the time limited, and was therefore insufficient.

Nor do we think it was incumbent upon the company, when it received the notice of the 11th of February, in which it was stated that it had been notified of the loss through its agent Scott, to deny that it had been thus notified, or take objection to this statement. The period for giving the notice had already elapsed, and therefore the case stands upon somewhat different ground from one where the notice is defective in some matters which can be remedied if objection is taken. In the former case the defect is incurable, while in the latter it is not. Good faith on the part of the company requires it to take its objection to a defective notice when there is time to remedy it, so that the

defect may be removed. But what possible advantage could it have been to the assured in this case, for the company to have denied that it had been notified as stated in the notice of the 11th of February? How could she have been prejudiced by the omission to contradict this statement. See *Patrick v. Farmers' Ins. Co.* 43 N. H. 621, *ante*; *The Inland Ins. & Deposit Co. v. Stauffer*, 33 Penn. St. 397, *ante*.

Again, is there anything in the case which shows that the company waived a strict compliance with this stipulation in respect to giving notice of loss, so that it is now estopped from insisting upon the objection that it was not given in time? It appears to us not. The facts relied upon to show a waiver are the following letters, written to the attorneys who forwarded the notice of the 11th of February with a letter of their own upon the subject of the loss: "Milwaukee, Feb. 14th, 1862. Messrs. Strong & Fuller: Gents.—Your favor is at hand, and contents noted. The president of the company (S. S. Daggett) will be at your place on Tuesday, Feb. 18th. Yours, &c. P. B. Hill, Secretary." "Office of the Milwaukee Mutual Fire Ins Co. No 4. Martin's Block, Milwaukee, April 30, 1862. Messrs. Strong & Fuller: Gents.—The president of the company will be in Racine the first of next week, to arrange the Hertzog matter. Yours, &c., P. B. Hill, Secretary, per T. D." A few days after the date of this last letter, Strong & Fuller were notified by the company that the matter was in the hands of its attorney, &c. There is nothing in these letters which authorizes the inference that the company intended to waive any ground of defence, or admitted its liability for a loss from which it had been discharged by the neglect of the assured in the specified time. See the following authorities on the point of waiver: *Lycoming County Mutual Ins. Co. v. Schollenberger*, 44 Pa. St. 259; *Trask v. The State Fire & Marine Ins. Co.* 29 Ib. 198; *Smith v. Haverhill Mutual Fire Ins. Co.* 1 Allen, 297; *Roumage v. Ins. Co.* 1 Green (N. J.), 110; *Nash v. Union Mutual Ins. Co.* 43 Maine, 343; *Eastman v. Carroll Co. M. F. Ins. Co.* 45 Ib. 307.¹

We do not think there is anything in the letters above quoted which, upon any sound principle, can be considered as a waiver of the defect in the time of giving the notice. As already observed, if the defect had been one that might have been cured, then, by omitting to apprise the assured of the ground of objec-

¹ See Table of Cases Reported for these cases.

Pleading. — Divisible Policy.

tion so as to give him an opportunity to remove it, the company might well be said to have waived the defect. The defect in this case might undoubtedly be waived, but the evidence of waiver should be clear and satisfactory.

We think the nonsuit was right, and that judgment of the county court must be affirmed.

DATE vs. GORE DISTRICT MUTUAL FIRE INSURANCE CO.¹
(Common Pleas, Upper Canada, Trinity Term, 1864.) *Increased Risk. — Weight of Evidence. — New Trial.*

Action on two policies of insurance. Pleas: That the plaintiff was not interested; that the risk was increased and rendered more hazardous after the insurance was effected.

On motion for a nonsuit, on the ground of the verdict being against evidence, the defendants having substantiated their plea, that the condition against alteration in the premises had not been complied with; or for a new trial, on grounds that the verdict was against evidence, and the weight of evidence: *Held*, that the *onus* being on the defendants to establish the alterations and increased risk, the judge could not nonsuit on the plaintiff's evidence, being contradictory in that respect; that from the facts disclosed in the judge's notes, the court would not order a nonsuit; that the verdict was not against evidence, though, perhaps, against the weight of evidence; that there should be a new trial, to explain the question of increased risk.

DATE vs. GORE DISTRICT MUTUAL FIRE INSURANCE CO.²
(Common Pleas, Upper Canada, Trinity Term, 1864.) *Pleading. — Divisible Policy.*

Declaration stated that by policy dated 29th May, 1861, the defendants insured plaintiff against loss by fire in the sum of \$1,200 on stock of hardware, &c., contained in a frame building situate on the west side of Water Street, in Galt, at 20 per cent.; and also that by policy of 28th June, 1861, defendants insured plaintiff on stock of hardware, &c., in a building situate on the west side of Water Street, in Galt, to the amount of \$1,200 at 20 per cent. On his two-story dwelling-house, &c., situated on the east side of Hunter Street, \$800, and on household furniture contained therein, \$800, at 5 per cent., making in all \$2,800, and averred that from the making of the policies the plaintiff was interested in the premises and stock till the time of the fire, when he sustained a loss of \$6,000, and averment that all things necessary had been performed by plaintiff to entitle him to bring this action.

The fifth plea averred that as to the second policy, at the date thereof, the stone dwelling-house, &c., mentioned therein, was under mortgage to one W. D., and that plaintiff gave no notice thereof to the defendants, nor procured said mortgage to be noticed in the policy as required by law, &c., whereby said policy is void.

To which plea plaintiff demurred, and assigned as causes of objection that the said second policy is divisible, &c., and that a mortgage on said dwelling-house does not affect plaintiff's right to recover in respect of the stock, &c.; that said plea confesses and does not avoid plaintiff's cause of action.

The defendants excepted to first count of declaration that plaintiff did not allege therein that he was interested in the stock, &c., at the time of loss, or at any other time, or that said stock was at any time injured or destroyed by fire, nor did it allege any breach of duty by defendants.

Held, 1st. That the declaration framed as above must be considered as containing two

¹ 14 Up. Can. C. P. 502.

² 14 Up. Can. C. P. 548.

Occupation of Premises.

counts, and that the same is good in form, as the general allegation at the end thereof must be considered as referring to the whole declaration.

- 2d. That when a policy covers two or more distinct properties, each of which is insured thereby for a specific sum, and at a fixed rate, respectively, the said policy must be considered as divisible, and therefore the fact of one of said properties having, at the date of the policy, been under mortgage, whereby the assured had an estate therein lesser than a fee simple, or said property was incumbered, does not affect the right of the assured to recover against the insurers in respect of the other properties mentioned in the policy, though no notice had been given to the insurance company at the time of application of one of such properties being under mortgage, and though no notice was by plaintiff procured to be made of such mortgage in said policy as required by ch. 52, Con. Stat. U. C. §§ 27, 67.

JOHN HARRISON vs. CITY FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, October Term, 1864.)

Occupation of Premises.

A policy of insurance, issued upon a dwelling-house occupied by tenants, and containing a provision that "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company, and additional premium paid, "will become void if the building is vacated, and the only notice given thereof is to an agent of the company whose authority is limited to take applications and countersign policies, to collect and receive cash for premiums, and to issue a 'binder' on special hazards for ten days," and no additional premium is paid; and it is immaterial that the insured did not know the extent of the agent's authority.

CONTRACT upon a policy of insurance issued by the defendants, an incorporated company of New Haven, Connecticut, upon the plaintiff's dwelling-house in Fall River.

At the trial in the superior court, before Vose, J., the following facts appeared: The insurance, which was for three years from the 2d of December, 1861, was effected through B. F. Winslow, the defendants' agent at Fall River, under a power of attorney authorizing him "to take applications and countersign policies, to collect and receive cash for premiums, and to issue a 'binder' on special hazards for the term of ten days." The plaintiff, in his application for insurance, represented the house to be occupied by tenants. The policy contained, among others, the following stipulations: "Unoccupied premises must be insured as such, or the policy is void." "Houses, barns, or other buildings insured as occupied premises, and the contents thereof, or as in or on occupied premises, the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company, and additional premium paid." From the inception of the policy until October 12, 1862, the building was occupied, but on that day it was vacated. The

¹ 9 Allen, 231.

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plaintiff introduced evidence that on the following day he verbally informed Winslow that the building was vacant, and that Winslow told him "to lock the door, and fasten the windows; and that he supposed that it would be soon occupied again;" and that the plaintiff fastened up the house as directed. The house was destroyed by fire, from some unknown cause, December 25th, 1862. The plaintiff testified that nothing was ever said to him by Winslow about paying any additional premium, and that he did not pay or offer to pay any such additional premium, but that he probably should have done so if Winslow had required it. The plaintiff also testified that he knew nothing of the power or authority of Winslow as agent. The judge instructed the jury that the plaintiff was not entitled to recover, and a verdict was accordingly returned for the defendants, and the plaintiff alleged exceptions.

BIGELOW, C. J. The premises covered by the policy declared on were insured as occupied premises, and it was expressly stipulated in the body of the policy that, in all cases in which premises are so insured, "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company, and additional premium paid." Under this clause, it is clear that the contract of insurance had terminated several weeks prior to the occurrence of the loss by fire. The notice to the agent that the plaintiff's tenants had left the premises, and that the premises were vacant, did not fulfil the stipulation in the policy. The agent had no power or authority to receive such notice in behalf of the company. He was a special agent only, with limited power. He could not issue a valid policy, or enter into contracts generally in behalf of the defendants. He was authorized only to receive and forward applications for insurance to the company, to collect premiums, and to bind the company on special hazards for the term of ten days. Beyond this his authority as agent did not extend. He could not receive any notice which would affect the rights of this company under a policy already issued, nor had he any authority to fix an additional premium in consideration of a change in an existing risk, which, by the terms of the policy, the parties had agreed should be deemed an increase of the hazard which the company originally assumed.

It is no answer to say that the plaintiff had no knowledge of

What Policy covers.

the limited extent of the agent's authority. This he was bound to ascertain before dealing with him as agent. No rule of law is more familiar or better settled than that which requires a person who transacts business with a special agent to take notice of the nature and scope of the agent's power. He is put on inquiry by the very fact that he is negotiating with an agent, and is bound to ascertain whether he can bind his principal in the transaction which he purports to carry on in his behalf. If it were not so, there would be no distinction between a special and a general agent, and all restrictions and limitations on an agent's authority would be nugatory. A principal would in all cases be at the mercy of his agent, however carefully and strictly he might have restricted his authority. *Lobdell v. Baker*, 1 Met. 201; *Snow v. Perry*, 9 Pick. 542; Story on Agency, § 133.

The St. of 1861, c. 170, relating to agents of insurance companies, has no application to a case like the present. That enactment was not designed to change in any way the rules of the common law regulating the power of agents or their authority to bind their principals, but only to declare that certain classes of persons should be deemed to be so far agents of insurance companies as to be liable to the penalty prescribed by Gen. Sts. c. 58, § 77.

Exceptions overruled.

SUFFOLK FIRE INSURANCE CO. & another, *vs.* JOSEPH BOYDEN.¹ (Supreme Court, Massachusetts, October Term, 1864.) *Mortgage Interest.*

If the interest of a mortgagee in possession has been insured *eo nomine*, at his own expense, the insurers, in case of a loss by fire before the mortgage debt is paid, cannot, upon an offer to pay the loss and the amount due on the mortgage above the loss, maintain a bill in equity to have the mortgage assigned to them, and to be subrogated to the rights and remedies of the insured under the mortgage. See *King v. State Ins. Co.*, *ante*, vol. 3, p. 186, and note.

SAMUEL WEST *vs.* OLD COLONY INSURANCE CO.²

(Supreme Court, Massachusetts, November Term, 1864.)

What Policy covers.

A policy of insurance upon goods "contained in the third story of a four-story building," over two specified numbers of a certain street, will cover such goods after their removal into another room subsequently hired and occupied by the insured in the same story of the same building; although the policy provides that it shall be void if the property insured shall be removed without necessity to any other place.

¹ 9 Allen, 123.

² 9 Allen, 316.

What Policy covers.

CONTRACT upon a policy of insurance for \$600, issued by the defendants upon certain goods, "all contained in the third story of a four-story brick slated building over Nos. 18 and 19 Harvard Place, Boston." The policy contained a provision that it should be void "if the said property should be removed without necessity to any other place."

It was agreed in the superior court that, at the date of the policy, the plaintiff occupied two adjoining rooms in the third story of the building described, and the defendants' agent saw the goods there. These rooms were separated from each other by a brick partition, in which there was a door; and were accessible by a stairway leading to one of them. After the date of the policy the plaintiff hired another room adjoining one of the former rooms on the same floor, over Nos. 18 and 19 Harvard Place, and moved into the same a portion of the goods insured, and gave up the room to which the stairway already referred to led. After this removal, the two rooms which the plaintiff occupied were approached by another stairway, which led to his new room. A plan was introduced in evidence, showing the relative position of the rooms. The risk was not increased by the change. By the fire, which happened during the term of the policy, goods in the room originally occupied by the plaintiff, to the value of \$200, were destroyed, and in the room into which he removed after the date of the policy to the value of \$600.

Upon these facts, judgment was rendered for the plaintiff for the sum of \$645.80; and the defendants appealed to this court.

CHAPMAN, J. The policy describes the property insured as being "all contained in the third story of a four-story brick slated building over Nos. 18 and 19 Harvard Place, Boston." It is agreed that this description includes three rooms; the third story of the building having been partitioned into three rooms before the date of the policy.

The defendants contend that the insurance covered property contained in only two of the rooms, because their agent saw it at the time when the policy was issued, and it was then contained in the two rooms, and the plaintiff subsequently hired another room, and changed the position of the property; so that at the time of the loss a part of it was contained in the room newly hired. Therefore they say that the property in that room was not covered by the policy, though it remained in the third story

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and was not so removed as to increase the risk. But to this it is answered that the words of the policy include all the three rooms, for they include the whole of the third story ; that there is no latent ambiguity,—such as there might be if there were two buildings to which one and the same description might be applied, nor even two stories of the same building ; nor one story of a very large block, containing many stores or tenements. But it is comparatively a small building containing two numbers, viz., 18 and 19 in the first story ; both of which are designated in the policy, and over both of which the insured property is described as being situated, so that there is a double description of the place where the insured property is situated, viz., “ in the third story,” and over Nos. 18 and 19 in the first story.

This answer appears to the court to be sufficient. There is no latent ambiguity ; nothing indefinite ; nothing general ; nothing applicable to a large space, or to more than one story of the building, but the language is definite and exact.

Personal property which is insured need not of necessity be in the place described at the date of the policy ; but it may be brought in afterwards. Thus, when a stock of merchandise is insured in a store, it is changed by selling out existing goods and bringing in new supplies. The same is true to some extent of machinery in a running factory. In this case, if it had been the intent of the plaintiff to make the changes which he actually did make, the present form of this policy would have been appropriate to the circumstances. Therefore the policy must be construed as granting liberty to make such changes.

The case differs from that of *Storer v. Elliott Ins. Co.* 45 Maine, 175, there being in that case so much of generality in the description as to leave room for a latent ambiguity ; and the insurers and the assured had both treated the stock of goods insured by the defendants as separate from the goods insured by the other companies, and contained in a different story of the building. The decision in that case was in conformity with the intent of the parties, which was apparent from the circumstances, the intent being that the defendants should be the exclusive insurers of the goods in the chambers, while other parties were insurers of the stock of other goods that were contained in the lower stories.

Judgment for the plaintiff.

Alterations. — Power of Receiver.

SARAH A. EVANS vs. TRIMOUNTAIN MUTUAL FIRE INSURANCE CO.¹

(Supreme Court, Massachusetts, November Term, 1864.)

Alterations. — Power of Receiver.

If a policy of insurance, issued by a mutual fire insurance company, contains a stipulation that "if, subsequent to the making of the application, any new fact shall exist, either by a change of any fact disclosed in the application, the erection or alteration of any building," &c., "by the assured or others, or any change be made not named in the application and specifically permitted by the policy, the policy thereon shall be void, unless written notice be given to the directors, their written consent signed by the secretary obtained, and an additional premium or deposit paid," the policy will be avoided by the erection or alteration of a building upon the premises without obtaining a written consent signed by the secretary, or paying any additional premium or deposit.

A receiver of an insurance company, appointed by this court, has no power to waive the rules of law in allowing claims offered for proof against the company.

THIS was a claim presented to the receiver, appointed by this court, of the Trimountain Mutual Fire Insurance Company, for a total loss under a policy for \$800, upon a dwelling-house, during the year from April 17, 1863, to April 17, 1864. The claim was rejected by the receiver, and the following facts, assented to by the plaintiff, were reported to this court : —

At a meeting of the corporation, held before the issuing of this policy, the form of policies was prescribed, and this policy, conforming to the prescribed form, contained upon its face the following condition : "If, subsequent to the making of the application, any new fact shall exist, either by a change of any fact disclosed in the application, the erection or alteration of any building," &c., "by the assured or others, or any change be made not named in the application and specifically permitted by the policy, the policy thereon shall be void, unless written notice be given to the directors, their written consent signed by the secretary obtained, and an additional premium or deposit paid." In February, 1864, Mrs. Evans desired to alter and enlarge the building insured, by the addition of a story to a part of it; and her husband, as her agent, took the policy to the office of the defendants, and informed the secretary and one of the directors, and, after some conversation, the alteration was consented to by them. These officers were under the impression that the consent ought to be signed by the president, and the secretary, accordingly, wrote upon the second leaf of the policy, and after the

¹ 9 Allen, 329.

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signatures, the following: "Boston, February 25, 1864. Permission is hereby given to the within insured to occupy the dwelling, insured by policy No. 1084, by mechanics, for the purpose of making such improvements and alterations as she may think necessary. The risk continues on said property and the policy is not vitiated." The secretary undertook to prepare the above permission, and the policy was left in his hands for that purpose. Mr. Evans left the policy, supposing that the secretary would sign the permission, and that he could receive the policy, with the permission signed by the secretary, upon calling for it within a short time; but he omitted to call for it until after the loss, which was on the 25th of March, 1864. Mr. Evans was informed by one of the officers, with whom he conversed, that the secretary "had power to fix it." The permission has never been signed since. No additional premium or deposit was paid or asked for. The officers of the company, who were present at the above interview, understood and consented that Mrs. Evans should go on with the alteration contemplated, without waiting for the permission to be signed.

The case was reserved by Chapman, J., for the determination of the whole court.

BY THE COURT. It has been repeatedly decided that the officers of a mutual insurance company have no power to waive express stipulations of their policies or by-laws, which relate to the substance of the contract, although they may waive such as relate merely to the proof of loss. *Priest v. Citizens' Ins. Co.* 3 Allen, 602; *Buffum v. Fayette Ins. Co.* Ib. 360; *Abbott v. Shawmut Ins. Co.* Ib. 213; *Mulrey v. Shawmut Ins. Co.* 4 Allen, 116; *Brewer v. Chelsea Ins. Co.* 14 Gray, 203.¹ The present case falls within this principle. The defendants had, by a formal vote, prescribed the form in which their policies should be made. They had thus deliberately determined the liability which they were willing to assume; and their officers could not, without a violation of duty, have undertaken to bind them by a policy issued in a different form. But the plaintiff's policy was in strict conformity to the prescribed form. She had distinct notice of the conditions on which she could with safety make alterations in her dwelling-house. And she proceeded to make such alterations, knowing that she had not complied literally with these conditions. We cannot say that a mutual insurance company, which wishes to

¹ See Table of Cases Reported for these cases.

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prevent the possibility of controversy as to the terms of supplementary agreements, may not provide that it will not be bound by any oral consent, which its officers may give, to a variation in the terms of the liability which it has assumed. This is what the present company has undertaken to do. And although the case, upon the agreed facts, is one of hardship to plaintiff, the rule of law cannot be varied on that account. And the receiver had no right to dispense with these rules, and determine the case upon principles of equity. See *Worcester Bank v. Hartford Ins. Co.* 11 Cush. 265; ¹ *Pendar v. American Ins. Co.* 12 Cush. 469; *Loring v. Manufacturers' Ins. Co.* 8 Gray, 28.²

POST *et al.* vs. ÆTNA INSURANCE CO.³ (Supreme Court, New York, November, 1864.) *Renewal.—Power of Agent.—Proofs of Loss.*

When a policy of insurance is renewed, and nothing to the contrary said, it will be presumed that the renewal was upon the original terms.

An agent will be presumed to have authority to renew a policy by having in his possession certificates of renewal and having similar ones before; and though an agreement to renew does not constitute a renewal, it imposes the duty of taking the necessary steps to renew and this duty will be enforced in equity.

The giving of immediate notice of loss being required by the policy, this must be furnished without delay, unless doing the act is excused or waived; and a waiver may be express or it may be inferred from circumstances. In this case the circumstances *held* to excuse a delay of over two months. The cases concur in maintaining the principle that if the underwriter intends to insist upon defects in the proofs of loss, he must notify the insured of that intention in time to afford him an opportunity to correct them.

ELISHA B. MORRELL vs. IRVING FIRE INSURANCE CO.⁴

(Court of Appeals, New York, — Term, 1864.)

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A building was insured against fire to the amount of \$3,000 by A, and to the amount of \$2,000 by B, in separate policies, each of which contained the following clause: "In case of loss or damage to the property insured, it shall be optional with the company to replace the article lost or damaged with others of the same kind or quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within twenty days after having received the preliminary proofs of loss," &c.

The building having been destroyed by fire, A and B served a joint notice upon the insured, that they were prepared to rebuild, and requested plans and specifications, which were furnished accordingly. The building having been reconstructed, the insured insisted that the contract to rebuild had not been substantially complied with, and brought an action on the policy against A, claiming to recover the whole amount of his original loss. *Held*, that he could not recover.

After the election and notice, a contract to rebuild existed between the parties, of such a kind that the contractor had received the entire consideration in advance. If this con-

¹ *Ante*, vol. 3, p. 589.

³ 43 Barb. 351.

² *Ante*, p. 172.

⁴ 3 Am. Law Reg. N. S. 404.

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tract is not fulfilled by the insurer, he is liable for the damages sustained by the non-fulfilment of the contract, which may be more or less than the amount insured. The action, consequently, should have been brought to recover damages for a breach of contract.

It seems that the action might have been brought against both insurers jointly or either separately.

THE defendant insured the plaintiff against loss or damage by fire, to the amount of \$8,000, on a certain three-story brick building in the city of Brooklyn, for one year from March 20, 1856. The policy contained a condition that "in case of loss or damage to the property insured, it shall be optional with the company to replace the article lost or damaged, with others of the same kind and quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within twenty days after having received the preliminary proofs of loss required by the ninth article of these conditions."

The building was destroyed by fire January 6, 1857. The action was upon the policy to recover the \$8,000 and interest. The plaintiff made the proof necessary to entitle him to recover. The defendant then read in evidence a policy of insurance upon the same building made by the Excelsior Fire Insurance Company for \$2,000, containing the like condition. The plaintiff also put in evidence a joint notice of both companies to the plaintiff, dated January 27, 1857, that they were prepared to rebuild the said building, and requested the plaintiff to furnish them with the plans and specifications of the same. The defendant then gave evidence tending to show that plans were furnished by the plaintiff to a builder employed by the companies; that the work of rebuilding was commenced in February, and was completed within a reasonable time, according to the plans furnished, and that the building was thereupon occupied by the plaintiff. The plaintiff gave evidence tending to prove that plans and specifications were furnished, and that the building was not properly constructed according to the plans and specifications, and that there had not been a substantial compliance with the stipulation to rebuild. The defendant gave further evidence upon this question tending to prove full performance of the work. It should be stated that the defendant, after putting in their evidence in chief, moved to dismiss the complaint on the ground that the action should have been brought upon the condition or covenant to rebuild, and not upon the policy. The motion was

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denied, and the defendant excepted. At the close of the evidence the motion was renewed, on the ground that it was shown that the two companies elected to rebuild, and made a joint contract to rebuild, and did jointly rebuild, and therefore the suit should be jointly against both companies. This motion was denied, and the defendant excepted. The court, after stating the case, and some facts not in dispute, stated that the company undertook to rebuild and did construct a building upon the same lot, and that the question is whether they have substantially complied with the condition of the policy touching the rebuilding. That it was the right of the parties to the contract to change it in regard to the form of the structure and the material of which it was composed. And if the company have put up such a structure as Morrell required, it is a sufficient performance of the condition, and the plaintiff cannot recover.

"To make out the defence the jury must be satisfied from the evidence that the new building, in respect to form, material, and goodness of workmanship, is substantially like the building destroyed, as the same were described in the plans and information given to the company by Morrell." "That if the jury are of the opinion that the company have failed to fulfil the condition and reconstruct the building in the manner which I have before specified, then the plaintiff is entitled to recover the amount of the loss, without reference to the value of the building which the company have put upon the premises."

The counsel for the defendant excepted in the language of the case: "1st. To so much of the charge as submitted to the jury the question in this case whether the defendants rebuilt as the building was before the fire. 2d. As to the measure of damages submitted." There were some requests to charge, some of which were complied with, and others not, and, as to some, the court refused to charge otherwise than as it had already charged.

The verdict was for the plaintiff, \$3,315. Judgment was entered upon the verdict, and upon appeal to the general term it was affirmed, and thereupon the defendant appealed to this court.

The opinion of the court was delivered by

MARVIN, J. This is a new case to which we are to apply, after ascertaining the contract between the parties, principles of law well settled.

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It is well settled law in this state that he who undertakes to build a house for another, or to perform any work, to be paid for when the house is completed, or the other work done, cannot recover any portion of the stipulated price or value of the work until he has substantially performed the contract on his part. *Smith v. Brady*, 17 N. Y. R. 178, and cases therein cited. It is also well settled law that when one contracts with another to build for him a house, or do other work, and agrees to pay portions of the consideration in instalments as the work progresses, and does so pay, or pays the whole consideration in advance of the performance of the work, he can maintain no action for money had and received, though the contract has been broken and remains unperformed, unless the contract has been wholly rescinded. His action must be upon the contract, and his damages must be for the breach or breaches of the contract. The amount of damages will not depend upon the amount of money he had paid, but the damages will be the amount of loss sustained by a failure to perform the contract. In other words, what it will cost to procure a full completion of the contract, including, if the case calls for it, any special loss by reason of delays, &c. In the present case the first of the above principles has been applied, and the defendant has been placed in the position of one who has contracted to construct a building in a certain manner, and for which he is to be paid after the work is done, and who claims that he has performed the contract, and seeks, by action, to recover the consideration, and is met with the issue that he had not performed the condition precedent, upon the performance of which his right of action depends. This issue being decided against the defendant, it is held that he is to have nothing on account of the house actually built, but is to pay to the plaintiff the entire sum specified in the policy as indemnity to the plaintiff for the loss of his building. I am not satisfied that this rule should be applied to the case.

It is important to determine, with some precision, what the case is; what the contract was between the parties. It is said that the contract was, on the part of the defendant, that in consideration of a sum presently paid, it would indemnify (the contract is insure) the plaintiff to the amount of \$3,000 for any loss he should sustain by fire on a certain building; and the defendant promised and agreed to make good to the plaintiff, &c., all

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such loss or damage not exceeding in amount the sum insured, as shall happen by fire to the property specified. But this was not the entire contract. One of its terms and conditions was that in case of any loss or damage to the property insured, it should be optional with the company to rebuild or repair the building within a reasonable time, giving notice to do so within twenty days after receiving the preliminary proofs of loss. What construction should be given to this provision? What relation was established by it between the parties? The agreement is not exactly that the defendants shall do one of two things, one of which being performed satisfied the contract. There is no absolute contract that the defendant, upon the happening of a certain event, should pay a sum of money or rebuild the house. But the agreement was that the defendant should pay an amount of money equal to the loss, not exceeding \$3,000. Call it an indemnity for the loss, and the question will not be changed, for the company might within twenty days after proof of the loss, elect or decide to rebuild the building, and give notice of such election or decision. In other words, the defendant had the right by the contract to elect to rebuild, and in that way indemnify the plaintiff by rebuilding. When the election to rebuild was made, and notified to the plaintiff, what was the relation between the parties? The building had been destroyed by fire. The amount of the loss may or it may not have been known. There may have been dispute between the parties touching the amount of the loss. The insured could only claim \$3,000, though the loss may have been greater. He could only recover his actual loss as an indemnity, but the actual amount of the loss may have been, and often is, a matter of dispute and difficulty requiring a lawsuit to settle it. The insured may claim a much greater sum than the insurer is willing to pay, and for the purpose of avoiding the difficulties and litigation likely to arise from such disputes, the insurer secures, by the contract, a right to indemnify the insured by rebuilding the destroyed building, instead of paying money, the amount of which is uncertain, and the insured agrees to accept indemnity in this way in lieu of any amount of money. All necessity for ascertaining the amount of the loss ceases when the insurer undertakes the restoration of the property. It seems to me that when the insurer elects to rebuild, and gives notice of such election, the contract at once is that the

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insurer will rebuild absolutely in consideration of the premises, and the defendant's agreement is that the insurer may do so, in satisfaction of the demand, uncertain in amount, which he claims of the insurer. This becomes the absolute agreement between the parties, by virtue of the agreement originally made, and which, prior to the election, was subject to certain contingencies, terms, and conditions; and it seems to me that after such election and notice, the relation between the parties is simply that of a contractor to build, who had received the entire consideration in advance, and a party for whom the building is to be erected, and who has made full payment, therefore, in advance of the work. Such, I think, is the fair construction of the contract. This provision was intended to obviate difficulties, some of which have been suggested. In this view no action could be maintained for the purpose of recovering the \$3,000, or such portion of it as should be equivalent to the loss. There can be no inquiry as to the amount of the loss. The action will be upon the contract to rebuild, and the amount of damages to be recovered upon a breach of the contract will be determined as in other actions for the breach of building contracts, and such amount may exceed the \$3,000. The defendant agreed that it would build the house, and it has been paid for its agreement, and must perform the agreement or pay the damages.

The peculiar language used in this provision has not escaped attention. "It shall be optional with the insurance company to replace and to rebuild," the insurance company "giving notice of their intention to do so." It may be said that the language is not sufficient to make a present contract to rebuild after the election and notice. That although the defendant had the optional right to rebuild and elected to rebuild, and gave notice of intention to do so, still it was not bound to go on and build, but it might stop and leave the insured to his remedy for a moneyed indemnity. This is not, in my opinion, the fair construction of the provision, nor was such the intention of the parties to the contract. The option was with the defendant, and it was to give notice of its election. The language as to the notice may not have been very happily chosen in using the word "intention" instead of the word *election*, *option*, or *choice*; but there can be no difficulty about the meaning. The right to rebuild, and the obligation to rebuild, depended upon an election to rebuild, and

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the notice was simply to inform the other party that such election had been made. The parties so understood the language. The notice actually given in this case said nothing about intention. Its language is: "We hereby give you notice that we are prepared to rebuild said building," and this was treated as sufficient, and both parties acted upon it. It seems to me very clear that, after the election and notice, there existed a contract between the parties for the rebuilding of the building destroyed, and the contract to make good in money the loss no longer existed between the parties. If I am right in the view taken of the contract, the position that the contract for indemnity in money remained in force until the house was actually rebuilt, must fail. This position would seem to regard the provision as an *accord* not valid as a *satisfaction* until executed, whereas I regard it as a part of the *original agreement* by which this provision might, upon the happening of a certain contingency, be substituted by the election of one of the parties for and in the place of the provision to indemnify in money, and it is the agreement of both parties, and both are bound by it. It is, I submit, an error to suppose that this was a conditional agreement by which, when performed, the previous agreement to pay in money was satisfied, and, if not performed, then such money agreement remained in force. I have read carefully the dissenting opinion of Justice Emott in the court below; and though I am not able to concur fully in his construction of the contract, I have no difficulty in adopting his argument against the rule of damages enunciated at the circuit.

Assuming that the agreement to indemnify in money was not entirely superseded by the agreement to rebuild, what would the rights of the parties be upon a failure or partial failure to rebuild? The defendant had the right to satisfy the claim for the loss by rebuilding. Suppose the loss to have been \$3,000, and the insurer expends \$2,000 judiciously and profitably towards the rebuilding of the house, and then stops; and the insured takes up the work and completes the house by expending \$1,000? Has not this claim for damages been partially satisfied? I certainly think so; and this is the position of Justice Emott. He applies to the case the same principle applicable to an action against a contractor for a breach of the contract to build, and refuses to apply the strict rule against a contractor who seeks to recover

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the price, and is met with the objection that the work has not been completed according to the contract. But the learned justice limits the recovery to a sum not exceeding the amount that would have produced indemnity had the agreement to rebuild never existed, and in this we differ. It seems to me that this rule will be very difficult in practice. The indemnity in money can never exceed the amount of the risk specified in the policy. Suppose the risk taken to be \$3,000, and the insurer elects to rebuild and actually expends, necessarily and properly, \$3,000, and the building is not completed, may he stop and leave the building to be completed by the insured at, say, the cost of an additional \$1,000? This must be so if the insured in such case is only entitled to an indemnity, measured by the sum of money specified in the policy; for the \$3,000, having been judiciously expended, is worth so much to him. The learned justice, however, lays down the rule, that the plaintiff is entitled to recover such an amount, not exceeding the amount of the insurance, as will be necessary to make the building erected equal in all respects, and similar to the one burned. The result of this rule would be, in the case above supposed, that the plaintiff could recover the additional \$1,000 expended by him, though the defendant had expended already the full amount insured, and this is precisely what I claim. But suppose the insurer expends \$1,000, and it cost \$3,000 to complete the building, the insured, by the rule laid down, will recover \$3,000. Will he not in such a case realize for indemnity \$4,000? Certainly he will. Or suppose the insurer expends \$2,000, and the insured \$3,000, to complete the building, the latter will recover the \$3,000 and thus realize \$5,000. He is to recover such an amount as will be necessary to complete the building, not, however, exceeding the amount of the insurance. Under such a rule, an insurer who has elected to rebuild, and has performed a part of the work and discovers that he has a hard bargain and cannot complete the work for the amount of the insurance, will at once abandon the work or may do so, being liable only for the payment of the amount insured. Under such a rule the amount of the loss will always come up for litigation and adjustment, and, as I understand, the principal object of the provision we are considering is to permit the insurer to obviate all disputes and litigation touching the amount of the loss by replacing the articles lost or damaged, or by repair-

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ing and rebuilding the building destroyed. By adopting the construction for which I contend, we have a simple rule which excludes any inquiry as to the amount of the loss, and the inquiry will be, has the insured replaced the articles or rebuilt the building in the manner agreed, and if not, the damages will be as in other cases of breach, by the builder, of his agreement to build.

It is supposed that, in a case like the present, difficulties exist touching parties to the action. I think that the supposed difficulties will disappear upon a brief examination of the law applicable to such cases. The plaintiff held two policies upon the same building, — one issued by the defendant, taking a risk of \$3,000, the other issued by the Excelsior Fire Insurance Company, taking a risk of \$2,000. Each policy contained the same provisions or condition touching the optional right to rebuild. In this case both of the companies elected to rebuild, and they united in one notice that they were prepared to rebuild. The case does not contain, as it should, the policies. But they were, of course, both *valid*, and, in contemplation of law, constituted one policy, so far as the amount of loss was concerned. That is to say, the insured could not recover the amount of his loss of each insurer, supposing it had been less than the smallest risk. All he is entitled to from all the insurers is one indemnity. If he recovers this of one of the insurers, such insurer may recover of the other, by way of contribution, his proper proportion. It is very common in this country to provide in fire policies, that in case of two or more insurances upon the same property, each insurer shall be liable only for a ratable proportion of the loss. See *Par. Mer. L.* 516, 517.

Whether it was provided in the present case that each company should only be liable for its ratable proportion of the loss, does not appear; but I think this will be seen not to be material. Though the plaintiff could not have maintained a joint action against the companies upon these policies if there had been no election to rebuild, but could have maintained separate actions, recovering from the defendant three fifths of the loss not exceeding \$3,000, and from the other company two fifths not exceeding \$2,000, it does not follow that, upon an election by both companies to rebuild, he could not maintain a joint action against both upon the agreement to rebuild; I think he could maintain such

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action, and that the action in this case should properly have been against both companies. When they jointly elected to rebuild, they jointly agreed to rebuild, and were jointly liable in an action for a breach of their agreement. I have no doubt the action would have been well brought against both companies. They would not be permitted to allege that they had not jointly contracted with the plaintiff. I am not prepared to say that the action was not well brought against the defendant alone. I think the plaintiff might well treat the election to rebuild as the election of each insurer, and for a breach of the building agreement maintain his action against either company, and recover full damages; or, perhaps, a separate action against each for full damages, collecting the damages, however, but once. I think these positions follow from the legal relations and rights of all the parties. The two companies were bound to pay the loss ratably, if so stipulated in the policies; and if not so stipulated, the whole loss should be paid by one, then the other would be liable for contribution. When one of the companies should elect to rebuild, it would come under obligation to the insured to make full indemnity by rebuilding; and if there were a provision in the policy that it should only be liable to pay a ratable proportion of the loss, such provision would be superseded by the agreement to rebuild. If only one of the insurers should elect to rebuild, and should perform the building contract, it would be entitled to contribution from the other company,—not a proportion of the amount expended in building, but a ratable proportion in money of the actual loss. So, also, if the company undertaking to rebuild should fail to perform the contract, and the insured should recover and collect damages for the breach of the agreement, such party could recover of the other insurer a ratable proportion of the loss. Such insurer would, by the payment of the damages recovered by the insured, have satisfied the demand for the loss. The insured would be fully indemnified, and the insurer who paid nothing and did nothing would be liable for contribution. In my opinion, the insured—in a case like the present—may have his action against both insurers jointly, or against either separately, and recover his full damages for the breach of the building contract, and leave the two insurers to an adjustment of their rights between themselves, according to well settled rules of law applicable to different insurers of the same property. The judgment should be reversed, and there should be a new trial.

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DENIO, C. J.; DAVIES, WRIGHT, ROSEKRANS, and BALCOM, JJ., concurred. SELDEN and EMOTT, JJ., dissented.

JAMES C. HIDDEN, executor, etc., vs. SLATER MUTUAL FIRE Ins. Co.¹ (Circuit Court of United States, Rhode Island, November Term, 1864.) *Interest. — Buildings under Lease.*

If the insured part with his interest before loss, he cannot recover.

Buildings under lease may be insured, but the policy in such case becomes invalid if the lessee, by mortgage and foreclosure, or otherwise, parts with his interest before loss.

The covenant in a lease of real property to pay an amount in addition to a specified rent, equal to taxes, and the cost of insurance for a certain sum, confers no authority on the lessee to insure for the benefit of the lessor.

Such a covenant still leaves it optional with the lessor to insure or not as he may choose, and when and where he pleases; but if he neglects to insure, the lessee has nothing to pay on that account.

AYRES vs. HARTFORD FIRE INSURANCE CO.² (Supreme Court, Iowa, December Term, 1864.) *Insurable Interest. — Construction. — Knowledge of Agent. — Trust Property. — Misrepresentations. — Acts of Agent. — Proof of Loss. — Waiver.*

One to whom a title bond has been assigned for land upon which improvements have been made by the obligee, has an insurable interest in the property.

In the case of a policy which is to be void if there be "any sale, transfer, or change of title;" *held*, that any transfer which would increase the temptation of the insured to defraud the company, or lessen his interest in protecting the property from fire, would avoid the contract. Effect of mere nominal transfer considered.

The knowledge of an agent for insurance of facts which would defeat the contract is not always the knowledge of the company.

The policy provided that property held in trust must be insured as such. And property in trust was defined to be property held under a deed of trust, or under the appointment of court, or as collateral security. *Held*, not to embrace property held in secret trust to defraud creditors.

Parol evidence *held* inadmissible to show that an agent failed to take down answers to questions, or that he changed the answers, where the authority of the agent extends only to receiving and forwarding applications. *Secus*, if the agent have power to pass upon the risk himself, and the applicant did not know what had been omitted or wrongly stated when he signed the application.

Where the policy provided that notice of loss should be given by the hand of the assured, notice by a third person not the agent of the assured is not good, though he be interested in the policy.

Objection to the proofs of loss upon one specific ground is a waiver of objections as to other defects in them.

DAVENPORT vs. PEORIA MARINE AND FIRE INSURANCE CO.³ (Supreme Court, Iowa, December Term, 1864.)

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The parties agreed upon an insurance on the 20th of March, on the night of which the property in question was destroyed by fire. A policy was executed and delivered the

¹ 2 Cliff. 266.

² 17 Iowa, 176.

³ 17 Iowa, 276.

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next day; both parties being ignorant of the loss. *Held* binding. And this notwithstanding the usual provisions of the charter that all policies should be signed by the president, &c.

THE above is a sufficient statement of the case.

COLE, J. The appellant's counsel assign nine distinct matters as errors of the court below, but in their argument they make but four points, and classify the assignment of errors thereunder, to which arrangement we will conform as far as practicable.

I. On the trial, the defendant offered to prove the instructions given by the defendant's agents to the clerk, as to taking risks upon vacant property, and also the defendant's instructions to their agents in regard to risks on small-pox hospitals and property termed extra hazardous. This evidence was excluded by the court, and, we think, properly. There was no offer to prove that the action of the clerk or agents was contrary to the ordinary actions of persons in those relations, or in excess of their general authority, or that the supposed instructions came to the knowledge of plaintiff. The rule is, as to the public, that the authority of a general agent may be regarded by them as measured by the usual extent of his general employment, and cannot be limited, as to them, by private instructions as to the mode and manner of executing his agency. 2 Pars. Cont. 40-42; Story on Agency, § 173 *et seq.*; *Hatch v. Taylor*, 10 N. H. 538; *Barber v. Britton & Hall*, 26 Verm. 112; *Lightbody v. The North American Insurance Company*, 23 Wend. 18. The defendant also introduced one of their agents, who made the insurance in this case, and asked him, if he had known there were rumors that the building was to be used for small-pox patients, current in the neighborhood, would he have taken the risk? This was objected to, and the objection sustained. While there might be some doubt as to the correctness of excluding this question, if the proof had shown that the plaintiff, by its committee, had knowledge of such rumors, and concealed them from defendant's agents; yet, since it appears from the evidence and finding of the court that they had no such knowledge, and therefore made no such concealment, the question is wholly immaterial, and the ruling of the court was therefore without prejudice to appellant. The language of the condition annexed to the policy, that any "omission to make known any fact or rumor material to the risk," must, of course, we think, be construed to mean any such fact or rumor

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known to the insured. Certainly, an omission to make known that of which the city or its committee had no knowledge, cannot, and ought not to be construed as a warranty that it did not exist.

II. The question and answer in relation to incumbrances in the application for insurance, became, by the express terms of the policy, a warranty that there were no incumbrances upon the property. That there were several large judgments for money rendered by the district court of Scott County, against the plaintiff, in full force, and unsatisfied, was proven and so found by the court. The question then is, were those judgments liens or incumbrances upon the property? By § 4105 of the Revision, it is provided that "judgment in the supreme or district courts of this state, or in the district or circuit courts of the United States, if rendered within this state, are liens upon the real estate owned by the defendant, at the time of such rendition, and also upon all he may subsequently acquire before the expiration of the lien, as hereinafter provided." By subsequent sections, the lien is limited to the counties in which the judgments are rendered, or counties in which attested copies are filed in the office of the district court clerk. Under these sections, the judgments are incumbrances, unless the property is exempted therefrom by other provisions. By § 8274, it is provided that "public buildings owned by the state, or any county, city, school district, or other civil corporation, and any other public property which is necessary and proper for carrying out the general purpose for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation." It was found by the court, and is conceded by counsel, that the building, in this case, was necessary and proper for the preservation of the health of the city, and for carrying on the purposes of its government. Our statute has a familiar exemption from judicial sale of the homestead of every head of a family, and it was held by this court in the case of *Lamb v. Shays*, 14 Iowa, 567, that a judgment did not attach as a lien upon property exempt from execution sale. Baldwin, C. J., delivering the opinion of the court, says: "The lien of a judgment upon lands in this state, being conferred by statute, it can only have such force as is given thereby, and it can only attach, or become effective in the

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manner, at the time, and upon the conditions and limitations imposed by the statute itself. A lien, without the power to enforce it, carries with it no advantage to the owner thereof. It cannot be enforced as against the homestead, because it is exempt from judicial sale. It is inoperative, and cannot be otherwise, as long as the homestead is used as a home. Construing the two sections together, having been passed at the same time by the legislature, we think that it could not have been designed that the lien should ever attach upon property that was declared exempt from judicial sale." This case is decisive of the question now presented, and fully supports the conclusion of the court below, that the judgments were not incumbrances on the property. See also *Cole v. Green*, 21 Ill. 104; *Green v. Marks et al.* 35 Ib. 221.

III. In the seventh assignment of error, appellant complains that the court erred, in finding as a conclusion of law, that the policy was binding from the 20th day of March, it having, in point of fact, as appears from the finding of the court, been executed and delivered on the 21st. The evidence fully sustains the finding of the court below, that an agreement for insurance was made between the parties, by their agents, on the 20th day of March. The policy was executed, delivered, and received, in perfect accordance with that agreement, and in ignorance of the fire, on the morning of the next day. The charter of the insurance company (defendant) provides, that "all policies of insurance made by the corporation shall be subscribed by the president, or, in case of his death or absence, by the vice-president, and countersigned and sealed by the secretary of the company; and all losses arising under any policy so subscribed and sealed may be adjusted and settled by the board of directors."

It is claimed by appellant's counsel, that under this clause in the charter, no agreement for insurance can be binding on the company, unless it is in writing, subscribed by the president, and signed and sealed by the secretary; and that, since the agreement in this case was in parol until after the loss, and the plaintiff had no insurable interest at the time the policy was actually signed and delivered, no recovery can be had thereon.

The English rule, that a corporation cannot expressly bind itself, except by deed, unless the act establishing it authorizes it to contract in another mode, has been broken in upon, and indeed

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entirely overturned, as a general proposition, throughout the United States; and it is here well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents, as by deed; and that promises may as well be implied from the acts of its agents, as if it had been an individual. *Angell & Ames on Corp.* § 237; *Bank of Columbia v. Patterson's Administrator*, 7 Cranch, 305; *Fleckner v. The United States Bank*, 8 Wheat. 357; *The Bank of United States v. Dandridge*, 12 Wheat. 68; *Dunn v. The Rector of St. Andrew's Church*, 14 Johns. 118; *The American Insurance Company v. Oakley*, 9 Paige, 496; *Overseers of North Whitehall v. Overseers of South Whitehall*, 3 Serg. & Rawle, 117; *Hamilton v. Lycoming Insurance Company*, 5 Barr, 344; *Legrand v. Hampden Sydney College*, 5 Munf. 324; *Union Bank of Maryland v. Ridgely*, 1 Harris & Gill, 413; *Hayden v. Middlesex Turnpike Corporation*, 10 Mass. 401; *White v. The Westport Cotton Manufacturing Company*, 1 Pick. 215; *Bulkely et al. v. The Derby Fishing Company*, 2 Conn. 256; *Garvey v. Colcock*, 1 Nott & McCord, 231; *Petrie v. Wright*, 6 Smedes & Marsh. 647; *Baptist Church v. Mulford*, 3 Halst. 182; *Abbott v. Hermon*, 7 Greenl. 118; *Waller v. The Bank of Kentucky*, 3 J. J. Marsh. 201; *Lee v. The Trustees of Flemingsburg*, 7 Dana, 28; *Bunscombe Turnpike Co. v. McCarson*, 1 Dev. & Bat. 310; *Bates & Hines v. Bank of Ala.* 2 Alabama, 452; *Eastman v. Coos Bank*, 1 N. H. 26; *Sheldon v. Fairfax*, 21 Verm. 102; *San Antonio v. Lewis*, 9 Texas, 69; *Palm's Adm. v. Medina Insurance Company*, 20 Ohio, 537, and very many other cases.

It is clear, then, that the defendant, as a corporation, had the power, by virtue of its existence, to bind itself expressly, in writing or by parol, through its authorized agents, in any matter within the scope of the object, purpose, or business for which it was created, unless by the act of its incorporation it was expressly limited therein. The only limitation to which our attention has been called, or which has any bearing on the question made in this case, is that which requires "all policies of insurance made by the corporation" to be signed by the president, and countersigned and sealed by the secretary. The limitation, then, only

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extends to "policies of insurance," and, therefore, any other contract may be made in writing or by parol, through its agents, as with other corporations. The contract, or agreement to execute a policy of insurance, is not within the limitations, and such a contract may be made in the ordinary way, through its agents, and will bind the corporation. It may be said that such a construction will place it in the power of an agent to bind the corporation to execute a policy in the manner provided by its charter; and thereby an agent may do indirectly what he could not do directly. This is true; and it results from the fact that the corporation possesses general powers for the accomplishment of the purposes of its creation, while the limitation specified by the charter extends to the direct act, and that alone. It would have been competent for the legislature to have imposed a further limitation, so as to have prohibited the indirect act also, except in the manner specified, or any other acts; but since the legislature failed thus to impose further restrictions, it is not competent for the courts to supply them. Upon principle, then, the agents of defendant had the power to bind the corporation by their agreement to execute a policy of insurance upon the property in question, and that it should commence to run from the time agreed upon. And the execution and delivery of the policy, on the next morning, in accordance with the agreement as made, and in the manner provided by the charter, was not only legal and binding in itself, but was an act obligatory on the defendant to perform. We have discussed this branch of the case so far upon principle only, without reference to precedent or authority. Let us now look at it in another view, and see if the same conclusion may be sustained by precedent.

In the case of *Kohne v. The Insurance Company of North America*, 1 Wash. C. C. 93, the agent applied to the president of the insurance company to effect an insurance on goods on board a ship, and settled with him the terms of the insurance, but left the office before the policy was filled up. It was soon after filled up and executed, and about the same time, the company received intelligence of the capture of the vessel and loss, which was not known to either party when the agreement was made and the policy executed. On a subsequent day, the agent called to pay the premium and receive the policy, but the company refused to deliver it, objecting that the agreement was inchoate, and having

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heard of the loss before the delivery of the policy, the company had a right to retract. But Mr. Justice Washington held that since there was no unfairness nor knowledge of the loss when the terms of insurance were settled, the objection was entitled to no weight, and the contract perfect and binding. In the case *Lightbody v. The North American Insurance Company*, 23 Wend. 18,¹ the plaintiff, through his agent, made a contract for insurance of buildings in Utica, with the defendant's agent in Troy, late in the evening of the 30th day of March, 1847, and paid the premium and took a receipt. About two o'clock in the morning of the next day, the buildings were consumed by fire. The policy was not made or delivered until the 21st day of April following, and was delivered by the agent after the plaintiff had called upon defendant for payment of the loss, which was refused, denying the authority of their agent to make the contract of insurance, and notifying him that the agent's authority, as their agent, had been revoked. The court, per Bronson, J., held that the policy took effect by relation, from the day of its date, which was on the day the premium was paid and the contract concluded; that it was the manifest intent of the parties that the contract should operate from the day of its date, so as to give the plaintiff the same legal remedy which he would have had if the policy had in fact been delivered on that day; and the law will give effect to that intention. The plaintiff had made a valid contract with the defendants, and was entitled to the usual evidence of that contract — a policy of insurance. He could have maintained an action on the case for a refusal to deliver the policy, in which he would have recovered damages to the full amount of his loss. But if his remedy at law was questionable, he had a perfect equitable right to the delivery of the usual policy, which he might have enforced in the proper form.

The plaintiff recovered the full amount of his policy and interest. In the case of *Perkins v. The Washington Insurance Company*, 4 Cow. 645,² the plaintiff, on the 5th day of January, 1820, applied to defendant's agent in Savannah, Georgia, the defendant being a corporation in New York, to insure a stock of goods for five thousand dollars, which the agent agreed to do for a premium of two and a half per cent. The plaintiff paid the premium accordingly, and the fee for survey and policy, and took the agent's receipt therefor. On the morning of the 11th day of

¹ *Ante*, vol. 2, p. 1.² *Ante*, vol. 1, p. 148.

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January, an extensive fire broke out in Savannah, and consumed the plaintiff's goods. The plaintiff gave notice to the agent of the loss, and offered the usual preliminary proofs, and demanded a policy of insurance; but the agent stated that he had not forwarded the premium to the company, and had not received a policy, and intimated that the company would not feel bound by what had been done. The proper notice, with the usual proofs, were, in May, 1820, given to the defendant in New York; but defendant refused to execute a policy, although plaintiff tendered the amount of premium. The plaintiff therefore brought his suit in chancery to recover for his loss, and set up in substance the foregoing facts. The defendant admitted the facts as stated, but denied the agent's authority to contract for insurance, but averred that he only had authority to make surveys, receive probable premiums, and transmit them to defendant to prevent unnecessary delay. The court held that the defendant was bound by the acts of the agent, and should make good to plaintiff his loss. In the case of the *Franklin Fire Insurance Company of Philadelphia v. Hewitt, Allison & Co.* 3 B. Monr. 281,¹ the policy of insurance did not cover the property intended and applied to have insured, but was not noticed till after the loss. The court held that plaintiffs were entitled to recover for the loss of the property, as specified to the agent in the application to him for the insurance. And the court say: "If then the company had delivered no policy, as according to the import of their agent's acts they were bound to do, the insured would have remedy against them in a court of equity, perhaps for coercing the execution of a policy before a loss, and certainly for enforcing the indemnity implied in the insurance upon the occurrence of a loss by fire, within the period fixed by the terms of the agreement."

In *Carpenter v. Mutual Safety Ins. Co.* 4 Sandf. Ch. Rep. 408,² the court held that an agreement to insure, evidenced by the receipt for the premium, may be specifically enforced, and that, if a loss happened, payment may be compelled in equity. Indeed, it is laid down as a general rule by Angell on Fire and Life Insurance, §§ 83 and 84, that in commercial towns, actions on mere agreements to insure, whether against fire or perils of the sea, are not uncommon; and they are always sustained whenever it appears that the terms of the agreement have been fully settled by the concurrent assent of the parties, so that nothing remains to be

¹ *Ante*, vol. 2, p. 202.² *Ib.* p. 505.

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done but to deliver the policy. The contract is executory in the first instance, and completed when the policy is drawn up. Mere receipts for premiums, are very common in the city of New York, and much insurance is effected in the first instance, by means of such receipts. When the negotiation for insurance is so far completed that nothing remains to be done but to deliver the policy corresponding with the terms and date of the application, should a loss occur before the execution of a policy, a court of equity would relieve the assured; and upon a bill properly framed, instead of confining itself to a specific execution of the agreement to insure, would probably decree the payment of the loss. There are very many other cases fully sustaining the doctrine, that an agreement by the agent to insure will be specifically enforced against the insurance company for which he acts, even where no policy has been executed. *Hamilton v. Lycoming Ins. Co.* 5 Barr, 339;¹ *Andrews v. The Essex Fire & Marine Ins. Co.* 3 Mason's C. C. Rep. 6; *McCullough v. Eagle Ins. Co.* 1 Pick. 278; *Palm, Adm'r, v. Medina Ins. Co.* 20 Ohio, 529;² *Tayloe v. Merchants' Fire Ins. Co. of Baltimore*, 9 Howard (U. S.), 390.³

IV. The doctrine that an act done at one time may take effect as of a prior time, by *relation back*, is well exemplified, in its application to insurance policies, in the case of *Lightbody v. The North American Ins. Co.*, *supra*, and fully sustains the view of the court below in this case. The fact that in that case the premium was paid and receipt taken does not vary the doctrine, which is, that where there are divers acts concurrent to make a conveyance, estate, or *other thing*, the original act shall be preferred; and to this the other act shall have relation. The contract or agreement to insure is the principal act, and whether the premium is paid or waived is an immaterial circumstance, and the formal execution of the policy may be a concurrent or subsequent act, and if subsequent, and made as of the date of the principal act, will have relation back to the time of doing that principal act. This doctrine is an old one, and has been repeatedly recognized.

In *Jackson ex dem. Loan Officers of Rensselaer, v. Bull*, 1 Johns. Cases, 81, it was held, that a deed executed in pursuance of a previous contract for the same premises is good by relation from the time of making the contract so as to render valid every intermediate sale or disposition of the land by the grantees.

¹ *Ante*, vol. 2, p. 542.² *Ante*, vol. 3, p. 310.³ *Ib.* p. 94.

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In *Jackson ex dem. June v. Raymond*, 1 Johns. Cases, 85, the same doctrine is held in a very similar case. In *Heath v. Ross*, 12 Johns. 140, a patent for land, dated the fourth of December, but which did not pass the great seal until the twenty-eighth of the same month, was held to relate back, as between the parties, so as to vest the title in the patentee from the *date*, and enable him to maintain trover for timber cut and carried away between those dates.

In *Jackson ex dem. Noah v. Dickinson et al.* 15 Johns. 309, the sheriff made a sale on the first day of March, but did not deliver the deed until the nineteenth of the same month. On the tenth of that month a mortgagee of the same land filed a bill of foreclosure, without making the purchaser at the sheriff's sale a party. It was held that the deed related back to the time of the sale, and that the purchaser was not precluded from contesting the validity of the mortgage in an action of ejectment at law, he not being a party to the bill in equity, as his title was acquired previous to the notice of *lis pendens* in chancery, though not consummated till afterwards. The court say, "The subsequent delivery of the deed being mere matter of form must have relation back to the time of purchase at the sheriff's sale." This doctrine is a fiction of law, resorted to for the promotion of justice and the lawful intention of parties, by giving effect to instruments, which, without it, would be invalid; but it is never applied to the prejudice of third persons, not parties or privies. See, also, *Doe v. Howland*, 8 Cow. 277, and argument of Mr. Jay; Com. Dig. Bargain and Sale, B; 9 Viner's Abr. tit. Relation, 290; *Jackson ex dem. f.c. v. Ramsay*, 3 Cowen, 75; *Klock v. Cronckhite*, 1 Hill, 107; *Jackson v. Bard*, 4 Johns. 280, &c. In this case the action is based upon a policy of insurance, duly executed by the defendant, in the manner provided by its charter, and dated prior to the loss. The defendant seeks to avoid liability on this policy, by showing by parol that the policy was not in fact executed or delivered until the day *after* its date. The plaintiff then shows by parol that such antedate was not the result of accident or mistake, but was done intentionally, and in pursuance of a previous contract between the parties. This parol testimony was clearly competent, and shows beyond controversy that there was no fraud, accident, or mistake in the transaction, but that both parties did exactly what they intended to do, and have put in writing, in a

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legal binding form, the mutual contract between them, and the obligations of the respective parties. Such a contract, thus fairly entered into, both good morals and good law require shall be enforced, and the losses, if any, must fall on that party which for a valuable consideration voluntarily assumed the possible burden of them.

Affirmed.

CARTER vs. HUMBOLDT FIRE INSURANCE CO.¹

(Supreme Court, Iowa, December Term, 1864.)

Construction.

A policy insured "the five-story brick building and three-story brick addition known as the Lawrence Block, occupied as stores on the first floor, the upper portion intended for a hotel, and to be unoccupied during the continuance of this policy." *Held*, not a warranty that all the rooms on the first floor were occupied. It was enough if *any* of the rooms were occupied.

WRIGHT, C. J. It is stated by counsel for appellant that the court below, in giving a construction to the language of this policy, was influenced by, and followed the case of *Stout v. The City Fire Insurance Company of New Haven*, 12 Iowa, 371, *ante*. Appellee's counsel also claims *arguendo* that that case is authority for the ruling of this. We have examined the language and points decided in that case with great care, and cannot see how it can possibly be regarded as authority upon the question now before us. It is true that the language of the two policies is very similar, and the same building was insured in each. But there the question was, whether the warranty as to the occupancy of the rooms on the first floor was continuous, or a mere affirmation that it was so used at the time the policy was issued. In that case, there was some testimony that the lower story was, after the date of the policy, used in part for a dancing academy, and hence it was material to construe the warranty, and determine whether it was a representation that a fact did then exist, or an engagement that the lower story was not only then occupied for a specific purpose, but should so continue during the continuance of the policy. Nothing is said in the opinion, however, indicating in the least what would amount to an occupancy within the meaning of the policy. No such question was before us, and hence [the point] was not decided.

We are therefore left to determine the present case uninfluenced by anything found in that opinion. And, in deciding it,

¹ 17 Iowa, 456.

Construction.

we have no single circumstance to aid us, beyond the very language of the policy. There is no survey, no statement in writing or otherwise, from the insured ; nothing to show what knowledge the insurers had at the time of the condition of the property ; in a word, no single thing, except the words used in describing the property and its condition. What, then, is meant by the words, "*occupied as stores on the first floor?*" When we have settled their meaning, the case is disposed of, for it is in effect conceded that they relate to the risk ; that they constitute an affirmative and express warranty that the lower story was thus occupied, and that if it was not so used, plaintiff cannot recover.

Plaintiff maintains that, if any of these rooms were occupied as stores, the language of the policy is met ; while defendant insists that each one of the nine rooms must have been actually occupied, and that if either was not, the policy is void. It seems to us that plaintiff's construction is correct, and that he was entitled to judgment upon the general verdict.

In stating the reasons leading to this conclusion, we remark that it is one of those questions which argument can assist but little to elucidate. The language is plain and simple, and conveys its own meaning. It is certainly true that the first floor would be thus occupied if two of the rooms were used for stores at the time. True it is that this would not be an occupancy of all ; nor does the policy so require. The language refers to the first floor as a whole, and not to the rooms or apartments into which it was divided. It does not say that these several apartments are thus used, but the first floor is thus occupied. And while we cannot concur in the argument of plaintiff, that the word "occupied" means the same as "constructed ;" nor yet fully in the position that the clause under consideration is descriptive merely of the object or purpose to which the first floor was to be devoted, we nevertheless think it was intended more to describe the manner of its intended occupancy and use, than as a warranty that each room was so used at the time. Thus it was contemplated that stores, in their ordinary signification, were kept (or to be kept) there, rather than billiard saloons, liquor shops, carpenter shops, or other establishments of a like character. And this view is strengthened by the fact that the building was a large one ; that it was unfinished ; the larger portion (all above the first floor) was to remain unoccupied during the con-

Construction.

tinuance of the policy; that it was *intended* for a hotel, while the lower or first floor was designed for stores. Its purpose and object was clearly shown in the manner of its construction, and while, according to the strict letter of this warranty, some occupancy of the first floor was necessary, we do not believe that it means that all of the subdivisions were occupied. The first floor was not unoccupied. And yet such was its condition, according to appellee's argument, in the light of the requirements of this policy.

Now, if it appeared that any of these rooms were at the time occupied for any other purpose than stores, much of appellee's argument would be entitled to weight. The case of *Wall v. East River Mutual Insurance Company*, 3 Seld. 372,¹ is of this character; for there the policy was on a rope-maker's stock "contained in a brick building occupied as a storehouse;" and it appeared that part of the building was used for packing hemp and spinning it into yarn, and the description was held to amount to a warranty that the whole building was occupied as a storehouse, and the policy was avoided because of the breach. Here, however, nothing of the kind is shown. And it may, certainly, well be doubted whether the policy in that case would have been avoided, if a portion of the building had been unoccupied. All such descriptions are to be understood in their plain and ordinary sense, unless there is something to indicate that they were to have a peculiar or unusual meaning. The connection in which they are found, and the general object and nature of the contract, are also to be considered. And therefore the words, "stores on first floor," might mean much more or less in some contracts than in others. Thus, as argued by appellee's counsel, if plaintiff had agreed to paint, or paper, or rent the "stores on the first floor," there would be little doubt but that this would mean all of them. But suppose an inquiry is made, whether a certain house is occupied, and the answer is in the affirmative, does this necessarily or fairly exclude the conclusion that a part may be unoccupied? Or, suppose A agrees with B to occupy a house consisting of several apartments, would the contract be broken if any one should be unoccupied? It seems to us most clearly not.

But, without adding more, we conclude, in the language of the court in *Wall v. Howard Insurance Company*, 14 Barb. 485, that

¹ *Ante*, vol. 3, p. 455.

Amount of Recovery. — Mortgagees.

“although a warranty must be complied with, even in matters that do not seem to affect the risk, yet the courts are liberal to the insured in giving an interpretation to the warranty; and they have been strict in requiring the insurer, who draws up the policy and deliberately chooses his own language, to use such as will, in its liberal understanding, clearly convey the intended meaning.” And see, to the same effect, *Sayles v. Insurance Company*, 2 Curtis C. C. Rep. 613, *ante*; also *Jefferson Insurance Company v. Cotheal*, 7 Wend. 73.¹

The judgment below is therefore reversed, and remanded with instructions to the court below to enter judgment in accordance with the general verdict.

DANIEL C. EMERY vs. PISCATAQUA FIRE AND MARINE INSURANCE CO.² (Supreme Court, Maine, Cumberland, 1864.) *Knowledge of Agent. — Mortgage. — Statute. — Contribution.*

Where a policy issued to the plaintiff since May 1, 1861 (ch. 34 Public Laws of 1861) bore upon its face the name of the agent, and no written application was made, but the agent examined the premises, and was fully informed of the state of the title of the insured; and one of the conditions of the policy was, that “if the property to be insured be held in trust or on commission, or be a leasehold, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance as to such property shall be void;” and the interest of the insured was in fact that of mortgagee, but neither that fact nor the fact that his interest as such was to be insured, appeared in the policy; *held*, that any error in description is imputable to the defendants, and that if there were any misrepresentation of interest it would avoid the policy only in case it was fraudulent. The statute annuls all provisions at variance with it.

EDWARD FOX et al., executors, vs. PHOENIX FIRE INSURANCE CO.³ (Supreme Court, Maine, Cumberland, 1864.) *Amount of Recovery. — Mortgagees.*

The plaintiffs as executors insured a mortgagee's interest in certain buildings and machinery with defendants; E., another mortgagee, whose mortgage was of a later date but was recorded earlier, also had a policy of insurance, issued by another company, upon the same property. In plaintiff's policy there was a provision that “In case of any other contract of insurance upon the property hereby insured, whether such other contract shall be void or not, as against the parties thereto, the assured shall not, in case of loss or damage, be entitled to recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property.” The jury were instructed that the plaintiffs were not liable to apportionment with E., but were entitled to recover the whole amount insured by them, being less than the loss or damage to the property. *Held*, correct.

¹ *Ante*, vol. 1, p. 354² 52 Maine, 322.³ 52 Maine, 333.

NORTH BERWICK CO. vs. NEW ENGLAND FIRE AND MARINE INSURANCE CO.¹

(Supreme Court, Maine, Cumberland County, 1864.)

Forfeiture. — Waiver. — Night-work. — Independent Contracts.

A forfeiture is waived by receiving a new premium with knowledge.

It is no violation of the terms of a policy on a factory that it is sometimes run at night, where the insured stated in the application that it was "usually" worked certain hours of the day, "short time now."

A permit to run the factory nights granted by the company's agent, and a waiver of previous acts of the kind held binding on the company, under the powers stated below.

A policy on merchandise and another on the factory issued by the defendants to the plaintiff held independent contracts.

THE case is stated in the opinion.

APPLETON, C. J. This is an action upon two policies of insurance issued by the defendants.

The policy No. 110 insures the plaintiffs' factory and other buildings and machinery, for the term of one year from January 1, 1861.

The seventeenth interrogatory in the application and survey is, "During what hours is the factory worked? The answer is, "Usually from 6½ A. M. to 12½ P. M., and 1 to 7 P. M. in summer; from 6½ A. M. to 12½ P. M., and 1 to 7 P. M. in winter. Short time now."

It appears that after August 1, the mill was run all night, and that, on October 19, the plaintiffs applied to John P. Slade, the defendants' agent, for permission to run it all night from "now to the end of the policy;" that, on October 29, Slade writes that the insurance companies will give the defendants a permit to run their "mill nights for the unexpired time due" on their policies, "by paying ½ per cent. premium, for three months." The plaintiffs, on 26th of October, acceded to these terms. Thereupon Slade, the agent of the defendants, indorsed on the plaintiffs' policy the following memorandum: —

"Fall River, Nov. 1, 1861.

"In consideration of fourteen and $\frac{38}{100}$ dollars additional premium, paid by the insured, permission is granted that the within named property may be run night and day until the expiration of this policy, without prejudice to the same.

"John P. Slade, Agent."

The buildings and property insured were burned on the morning of November 2.

¹ 52 Maine, 336.

The defendants insist that the answer to the seventeenth interrogatory is a warranty on the part of the plaintiffs that their factory is not to be run nights, and that having been broken by running from August 1 to 19th of October, the policy thereby became void ; and that thus they are absolved from all legal obligation.

The defendants were not harmed by the running of the mill all night between the 1st of August and the 24th of October, when their agent stated to the plaintiffs the extra premium he should require for such running. From the answer to the seventeenth interrogatory, it may fairly be inferred that it was expected that at times the mill would be run nights. Whether such running, unattended with loss, would render the plaintiffs' policy void, it is neither necessary to consider nor to determine.

A forfeiture is to be construed strictly. Its enforcement is not to be favored. It may be waived by the acts and conduct of the party whose right it is to exact it. The renewal of a policy, after the existence of facts which would authorize the insurer to insist upon a forfeiture would be deemed a waiver. Thus the forfeiture, by reason of a misrepresentation or concealment, may be waived by the insurers ; as by receiving a new premium on a fire policy, after the misrepresentation is known. 1 Phil. on Insurance, § 668 ; *Allen v. Vermont Mut. Fire Ins. Co.* 12 Vermont, 366.¹ So the act of receiving an additional premium for the variation of a risk must, in the absence of fraud or concealment, be regarded as having the same effect. It would be a gross fraud to receive a premium for the continuance of a policy or the variation of a risk, with the intention of avoiding the insurance, if the risk provided for should occur, and of retaining the premium in case it should not.

The agent of the defendants testified he knew the plaintiffs had been running their mill nights when he gave his permission of November 1, 1861. In his letter to the defendants of November 2, he writes : " They had been working night and day for some time. They wrote me a few days ago for a permit to work day and night, and agreed to keep a watchman." The extra premium for permission to run the mill nights was received by the defendants after the loss, and without objection. No complaint appears to have been made on their part of any con-

¹ *Ante*, vol. 2, p. 13.

cealment or misrepresentation on the part of the plaintiffs or of their agent.

Nor is this all. The defendants, by their power of attorney under seal, appointed John P. Slade, of Fall River, their agent; "and, as such agent, he is authorized and empowered to receive proposals for insurance against loss or damage by fire, and to *make* insurances by policies of said New England Fire and Marine Insurance Company of Hartford; to *renew* the same, or to *vary the risk*, according to the rules and instructions he shall from time to time receive from the said company. And all policies of insurance against loss or damage by fire, *issued by* said agent, shall be to *all intents* valid and binding upon the said New England Fire and Marine Insurance Company of Hartford."

There is no proof that the agent has violated any rules or regulations he may have received from the defendants. His authority is most ample. He may issue policies. He may renew them. He may vary the risk. His *acts* are "to all intents valid and binding" on the defendants. Notice to him must be deemed notice to the company. The insured had a right to rely on his acts. Indeed, it has been held that a general agent may waive, under some circumstances, a condition in the policy that no insurance shall be considered as binding till actual payment. *Sheldon v. Atlantic F. & M. Ins. Co.* 26 N. Y. 460, *ante*. Much more would he be deemed to have such right, when powers as ample as in the present case are conferred.

In the policy on the personal property there is found no limitation as to the time plaintiffs were to run their mill. The plaintiffs might therefore, so far as regards this risk, run their mill the maximum of time. The two policies have no connection. Each must be construed by itself. The instructions in this respect were correct. There was no increase of risk within the meaning of the policy — for the plaintiffs were under no restrictions by its terms as to the time they might run their mill.

The letters introduced were legally admissible. They were originals. The plaintiffs were under no obligations to offer more of the letters of the defendants' agent than they should deem conducive to their interest.

Motion and exceptions overruled.

CUTTING, DAVIS, WALTON, and BARROWS, JJ., concurred.

Notice of Incumbrance. — Warranty.

ISAIAH LEWIS vs. MONMOUTH MUTUAL FIRE INSURANCE CO.¹
(Supreme Court, Maine, Lincoln, 1864.) *Waiver of Proofs of Loss.*

In the case of mutual companies, where the provisions of the charter relate to the formation of the contract, when they enter into and become part of it, then the officers of the company cannot waive them even by express agreement. But when these provisions do not touch the substance of the contract, but relate only to the form in which the liability of the company is to be ascertained and proved, then the proper officers may waive them. The present case *held* to come within the last named rule.

No objection having been made to the proofs of loss in this case, but the defence of the company being put upon other grounds, *held*, a waiver of any defects in the proofs.

BUCKLEY vs. GARRETT et al.² (Supreme Court, Pennsylvania, 1864.) *Transfer between Co-tenants. — Assignment.*

A transfer by one tenant in common to his co-tenant, or from one partner to another, is within the prohibition of a policy of insurance which declares that alienation, by sale or otherwise, shall forfeit the policy.

But a provision in a policy of insurance that it should become void upon a sale or transfer of property insured, unless it was also transferred to the purchaser, and the transfer accepted by the president or secretary of the company within twenty days after the sale or transfer, or before a fire, the assignment to be indorsed on or annexed to the policy, does not apply to a case where the assured has parted with his interest in the policy by an assignment approved by the company; and the policy is not avoided by such assignment.

Where the policy was to continue so long as the yearly payments stipulated therein were made, and after its assignment, approved by the insurance company, one of the partners of the firm insured sold and transferred his interest in the property insured to his co-partner, who continued for several years thereafter to make the yearly payments required by the policy to the treasurer, the authorized agent to receive them, but no notice of the sale of the partnership interest was regularly given, nor any transfer of the policy executed to the purchaser, it was *held* not thereby necessarily void; but that the facts were evidence to be submitted to the jury upon the question whether the state of the policy was known to the company; if so, their receipt of the annual premium four years after the assignment tended to show an acquiescence in the alienation, or waiver of the forfeiture, and consequently an estoppel.

Hence it was error to instruct the jury that, the transfer by one of the partners to the other having made the policy void, the payment of the annual instalments to the treasurer and acceptance by him would not render it valid, and that under the evidence the plaintiff was not entitled to recover.

PENNSYLVANIA INSURANCE CO. vs. GOTTMAN'S ADM'R.³ (Supreme Court, Pennsylvania, 1864.) *Notice of Incumbrance. — Warranty.*

The stipulation in an insurance policy requiring the person whose property is insured to give notice to the insurance company of an incumbrance or levy made upon the property insured, is a substantive and material part of the contract.

Where an insurance was made upon the liquors and furniture of a public house, and in answer to an interrogatory, the person whose property was insured stated that the liens upon her real estate amounted to a certain sum, when they really amounted to a much larger sum;

¹ 52 Maine, 492.² 47 Penn. St. 204.³ 48 Penn. St. 151.

Valued Policy. — Warranty. — Over-insurance. — Statement of Interest.

and the condition to the policy stated that the policy should be void if the answers thus made were not true. *Held*, that such answer is a warranty, and not merely a representation.

Where two executions were levied before the policy took effect, and one afterwards, all of which liens lasted until the fire occurred by which plaintiff's property was burned, *held*, that notice ought to have been given to the insurance company, and that for the want of such notice the right to recover was forfeited.

LYCOMING INSURANCE CO. vs. MITCHELL & BOYLE.¹

(Supreme Court, Pennsylvania, Pittsburg, 1864.)

Valued Policy. — Warranty. — Over-insurance. — Statement of Interest.

A valued policy of insurance is not one which estimates merely the value of the property insured, but which values the loss, and is equivalent to an assessment of damages in the event of a loss.

A warranty in a policy is a contract as to an existing fact, and not a covenant for future acts, and differs from a representation in that it is a binding agreement that the fact is as warranted; while a representation is not an agreement that the fact stated is so, but only such a statement of it as will constitute a misrepresentation if it be untrue. Where a policy of insurance fixes the value of the property insured, and contains a condition not to insure more than two thirds of this value, it is an undertaking on the part of the insured, which, if broken, will prevent a recovery on the policy unless the company were informed of the over-insurance, and waived the forfeiture.

It is error to submit to the jury the question of notice to the defendant of over-insurance, when the evidence shows that none was given to the company or its authorized agent, but only that the fact was ascertained by the agent of another insurance company while transacting business for his principal, and was not communicated to the defendant. The rule which requires an applicant for insurance to set forth the nature of his interest in the property to be insured does not extend to assignments of policies while in force: hence, it was not error to charge the jury in an action on a policy for the use of persons to whom it had been assigned, that the omission of the latter to inform the company of the extent of their interest in the property, at the time of the transfer or renewal of the policy, would not prevent a recovery, if the defects in title or otherwise were waived by the proper agent of the company.

ERROR to the common pleas of Indiana County. This was an action of covenant on a policy of insurance by James Mitchell and William Boyle, for the use of David Ellis and Conrad Hoffman, against the Lycoming County Mutual Insurance Company.

The policy was for \$5,000, dated December 10, 1855, to take effect from November 22, 1855, and continue five years. The property insured was a new frame grist-mill, seventy by forty-five feet, in White Township, with the machinery, stock, engine, boiler, &c.

Mitchell and Boyle were owners of four lots of ground in White Township, by purchase, under articles of agreement, from James and John Sutton, on which they erected the steam flouring-mill above mentioned. The agreement was dated July 22,

¹ 48 Penn. St. 367.

1855, and the consideration was \$1,000. On the 10th of December, 1855, they obtained the policy on which this suit was brought. The deed was dated April 25, 1856.

The policy contained a clause providing for a reference to the application for a more particular description of the insured property, making it part of the policy.

The application valued the real estate at \$11,180, and there was in the policy this stipulation: "It is also agreed that the aggregate amount insured in this and other companies on the above mentioned property shall not exceed two thirds of the estimated cash value."

On the 17th of June, 1856, Mitchell & Boyle obtained a policy of insurance from the Cumberland Valley Mutual Protection Insurance Company for \$2,500 for five years.

On the 3d of January, 1857, William C. Boyle conveyed his interest in the premises to James Mitchell for \$10,000, and subsequently transferred his interest in these policies, which transfers were duly ratified by the agents of the companies.

On the 13th of April, 1857, James Mitchell obtained another policy from the Cumberland Mutual Protection Company for \$1,000 for five years. On the 11th of April, 1859, a policy from the Pennsylvania Insurance Company for \$1,750, and on the same day one from the Pittsburg Life, Fire, and Marine Insurance Company for \$1,750.

On the 15th July, 1857, James Mitchell, by articles of agreement, sold his interest in said premises to David Ralston, David Ellis, and James P. Carter, for the consideration of \$16,000, on which they paid \$8,419.87, Mitchell agreeing to transfer the policy of insurance to the purchasers. The greater part of the purchase money, by the terms of the agreement, was to be applied to incumbrances on the property.

On the 17th day of July, 1857, James Mitchell transferred the policy on which suit was brought to Ralston, Ellis & Carter, by writing indorsed on the policy, having first obtained the consent of the company, by writing indorsed on the policy, in the following words: —

"And now the consent of the board of directors is given that James Mitchell, assignee as above of William C. Boyle, as to the within policy, may assign his interest in the same to David Ralston, David Ellis, and James P. Carter, doing business under

Valued Policy. — Warranty. — Over-insurance. — Statement of Interest.

the firm of Ralston, Ellis & Carter, same property in Cumberland Mutual policies, Nos. 4419 and 4779, former for \$2,500 for five years from 16th June, 1856, the latter for \$1,000 for five years from 18th April, 1857 (17th July, 1857). The said company reserving the right to retain the sum of \$1,250, being the amount of previous note, in the case of loss or damage by fire to the property insured, as is provided by the by-laws of said company.

R. B. McCabe, *Agent*."

When the transfer of the policy from Boyle to Mitchell was made, the premium note of Mitchell & Boyle was surrendered to the company, and a new premium note given by Mitchell. The premium note of Ralston, Ellis & Carter was taken by the company, and the premium note of James Mitchell surrendered at the time of the transfer of the policy to them. Mitchell & Boyle having failed to pay incumbrances on the property, it was sold by the sheriff on judgments against them prior to the sale to Ralston, Ellis & Carter, and purchased by John Watt, on the 4th January, 1859. John Watt, on the 5th January, 1859, sold the property, by agreement of that date, to David Ellis. On the 24th January, 1859, David Ellis sold to C. Hoffman the undivided one half part, consideration \$4,600. On the 27th January, 1859, Ralston, Ellis & Carter assigned the policy of insurance, on which suit is brought, to Ellis & Hoffman, the present plaintiffs, and on the same day the assent of the company to the transfer was given, in writing, indorsed on the policy by R. B. McCabe, Esq., Agent, and the premium note of Ellis & Hoffman was taken by the company, and the note of Ralston, Ellis & Carter surrendered. Assessments were made by the company, and collected from Mitchell, after the transfer of the policy to him. Assessments were also made to Ralston, Ellis & Carter, after the transfer to them, and collected. Assessments were also made to Ellis & Hoffman, after the assignment of the policy to them, and collected.

On the 1st May, 1859, the mill property was entirely destroyed by fire, and the loss total. The record did not show any liens against Mitchell & Boyle, at the time the application for the policy was made, except the Sutton mortgage on the lots, but at the time of the approval of the transfer to Ralston, Carter & Ellis the liens were \$18,000.

There were some irreconcilable discrepancies in the statements

made on the paper books of the parties, as to dates of transfer, amount of liens, and the time when the loss occurred, but the above statement presents the material facts of the case. There was no controversy as to notice of the loss or the preliminary proofs of it, but on the trial of the cause the defendants insisted that the policy was void in Mitchell's hands for over-insurance, and could not be revived by ratification of the transfers. They further contended that even if it could, the concealment of the incumbrances and of the nature of the title not having been made known to the company or the agent, when he ratified the transfer from Mitchell to Ralston, Carter & Ellis, would avoid the policy, and for the same reasons it was void when ratified to Ellis & Hoffman, and requested the court to instruct the jury: —

1. The policy in this case being a valued policy, and the condition not to insure more than two thirds of the valuation, that condition, being on the face of the policy, was a warranty, and if broken the plaintiffs cannot recover, unless the company were informed of such over-insurance, and waived the forfeiture.

2. That R. B. McCabe, Esq., being the agent of the company under limited powers, had no authority to consent to any over-insurance, or to waive the forfeiture by so doing. Such consent can only be given or waived by the directors, or president, or secretary of the company.

3. That the knowledge of the over-insurance obtained by Sampson was no notice to the company, as he was not acting for the company when he took the application for insurance in the Pennsylvania Company and the Pittsburg Life, Fire, and Marine Insurance Company, and also a policy of \$1,000 in the Cumberland Valley Insurance Company, and as he did not inform the company of such application and he had no authority from the defendants to assent to the same.

4. That Ralston, Ellis & Carter, and Ellis & Hoffman, having only an equitable estate in the premises, with only a small amount of the purchase money paid at the date of the respective renewals of the policy, and not having made the same known to the company, the latter have the right to avoid the policy.

The court below answered these points as follows: —

"1. We do not view this policy as containing a warranty. It is true the condition not to insure more than two thirds is on the

face of the policy, but it is not the averment of an existing fact, but a stipulation against future operations and acts. And the valuation in the application, whether \$11,810 or \$15,000, is not in the policy, but only referred to, which makes it a representation and an estimated value. This point is therefore answered in the negative.

"2. The letter of attorney of R. B. McCabe, Esq., was a general power to take risks and make surveys, which involves the right to do everything incident to those powers. Moreover, as a general rule, if an agent whose authority is limited, as between the constituent and agent, does acts beyond the authority, they would not be binding; but as to the rest of the world, if held out as having a general power and exercising it as such, they would be binding on his principal. To establish notice to an agent, however, that will bind the company, the evidence ought to be full, clear, and satisfactory. The jury are the judges of the weight of the evidence to that purpose.

"3. If Sampson, at the time the policies of insurance were laid before him, was not acting as the agent of the defendants, nothing that he did on such occasion would affect the defendants, although he was their agent during that time. The jury will decide how this was. If he was the agent of the defendants, and was acting as such, the notice of the policies laid before him would be a waiver of the forfeiture.

"4. This point is answered in the negative if the jury believe any defects in the title or otherwise were waived by the constituted agents of the company, by renewing the policies."

Under these instructions there was a verdict and judgment in favor of the plaintiffs for \$2,298.66. Whereupon the defendants sued out this writ, and assigned for error the answers given by the court to the points above mentioned.

The opinion of the court was delivered by

AGNEW, J. Looking at the language of the defendants' first point, there is certainly much excuse for the error into which the court below fell in their answer; and were it not that in weighing the whole case as it ought to have appeared to the mind of the judge when he answered the point, and the manifest injustice resulting from the instruction, we should be disposed to leave the plaintiffs in error to take the consequences of the inapt, indeed incorrect language of the point.

A "valued policy" is not understood to be one which estimates the value of the property insured merely, but which values the loss, and is equivalent to an assessment of damages in the event of a loss. So a "warranty" in a policy is understood to be a contract relating to an existing fact, and not a covenant for future acts, and differs from a representation in the circumstance that it is a binding agreement that the fact is as warranted; while the representation is not an agreement that it is so, but such a statement of it as will constitute a misrepresentation if it be untrue. These expressions, "valued policy" and "warranty," therefore, tended to mislead. But when we examine the entire language of the point and the attendant circumstances, the meaning of it ought not to have been misapprehended. The clause in the policy on which the question arose was, that the aggregate amount insured in that and other companies "shall not exceed two thirds of the estimated cash value."

The language is *shall* not, not *does* not. It clearly imported a covenant for future acts. The policy in suit was the first in order of time, the evidence before the mind of the judge disclosing to him that the over-insurance was constituted wholly of subsequent policies. The evidence also disclosed the fact that a subsequent ratification was the ground relied on by the plaintiff below to avoid the forfeiture caused by his subsequent insurance. The remaining points also disclosed most clearly the views of the plaintiff founded on this evidence, while the answers of the judge to them evidence his own full understanding of the case that the question was, whether there had not been an over-insurance subsequently taken, contrary to the stipulation in the policy, and whether the forfeiture arising in this fact was afterwards waived, and the policies ratified. Now, even incumbered with the inaccurate expressions, how could the substantial meaning of the point be mistaken? The point read thus: "The policy in this case being a valued policy, and the condition not to insure more than two thirds of the valuation, and that condition being on the face of the policy, was a warranty, and if broken the plaintiffs cannot recover, unless the company were informed of such over-insurance, and waived the forfeiture." The expression "valued policy" is immediately connected with the condition not to insure more than two thirds of the valuation, referring clearly to future insurance. The valuation thus referred to corrects at once the

meaning of "valued policy," by referring it not to an assessment of loss, but to the measure of the future insurance. So, when the point proceeds to say, "and that condition being on the face of the policy, was a warranty," it is but a restatement of the condition not to insure more than two thirds of the valuation, importing an act subsequent to the policy. Warranty, therefore, clearly means not warranty in its special sense, but an undertaking, or agreement, and is made clear by what follows: "and if broken, the plaintiffs cannot recover unless the company were informed of such over-insurance," &c. The over-insurance was all subsequent, corresponding with the undertaking not to insure, as referring to future acts. The substantial meaning of the point was certainly this: The policy being one fixing the value, and the condition not to insure more than two thirds of the valuation, being on the face of the policy, was an undertaking, and if broken the plaintiff cannot recover, unless the company was informed of the over-insurance, and waived the forfeiture. To this proposition the defendants were entitled to an affirmative answer. It was the leading point of the case.

We are unable to determine upon the correctness of the answer to the second point. Neither the letter of attorney nor the instructions to McCabe, the agent, are furnished, while the notes of testimony spread upon the paper book are too brief and meagre to gather the facts. This is the fault of the plaintiff in error. In reference to Sampson's knowledge we have only his own testimony, which asserted that it was not acquired in the transaction of the affairs of this company, but while attending to other policies. The court therefore seems to have erred in submitting the fact of notice to the company to the jury, against the only evidence in the cause.

There are cases where the applicant is bound to set forth the nature of his interest in the property insured. *Reynolds v. State Mutual Insurance Co.* 2 Grant's Cases, 826; *Sweeney v. Franklin Insurance Co.* 8 Harris, 837. Such also is the case of a mortgagee who insures his interest, one which from its nature depends upon prior incumbrances for its value. *Smith v. Columbia Insurance Co.* 5 Harris, 253; ¹ *Insurance Company v. Updegraff*, 9 Ib. 513.² But the mistake of the plaintiff in error is in supposing an assignment to the equitable owners to be a new insurance. The

¹ *Ante*, vol. 3, p. 271.² *Ib.* p. 680.

Incumbrances. — Concealment. — Waiver.

policy was for five years, and unexpired, and there is no condition against assignment except to procure assent, which was done. Certainly in the absence of express stipulations, every policy is assignable, subject only to the conditions contained in it. If this were a renewal, the argument might assume more weight. But the question of interest or estate belonged to the issuing of the policy, and not to its assignment. We see no error in the answer to the fourth point.

The judgment is reversed, and a venire facias de novo awarded.

CUMBERLAND VALLEY MUTUAL PROTECTION CO. vs. MITCHELL, for use, etc.¹

(Supreme Court, Pennsylvania, Pittsburg, 1864.)

Incumbrances. — Concealment. — Waiver.

In an action on a policy of insurance, where the defence rested on a false representation by the party insured, as to the existence of incumbrances on the property, it was held not error in the court to refuse to instruct the jury, as matter of law, that it was such a fraud on the company as would avoid the policy. Whether the false representation was or was not wilful and fraudulent, was a question of fact for the jury, under proper instruction as to the effect of such a representation.

Nor was it error to refuse to charge the jury, that the concealment of the existence of incumbrances, at the time when the ratification of the transfer of the policy was procured, was such a fraud on the company as would vitiate the policy in the hands of the assignee.

It is not necessary that the interest of persons in the property insured be stated, when application is made for the ratification of the transfer of a policy of insurance.

A contract of affirmance founded on misrepresentation is voidable but not void, and if an insurance company, after knowledge of the facts, recognize the existence of the contract by acting upon it, demanding and receiving payments of assessments under it, they thereby waive all right to avoid it.

ERROR to the common pleas of Indiana County. This was an action of covenant by James Mitchell, for the use of David Ellis and Conrad Hoffman, against the Cumberland Valley Mutual Insurance Company, on a policy of insurance issued by the defendants on the 24th of April, 1857, covering a steam-mill then owned by the legal plaintiff.

The material facts of the case were these: —

On the 3d January, 1857, William C. Boyle was the owner of the property, subject to a mortgage of James and John Sutton for \$1,116.32. On that day he executed a deed to James Mitchell, the legal plaintiff in this case.

On the 24th April, 1857, upon the application of James

¹ 48 Penn. St. 374.

Mitchell to the agent of the defendants, dated March 31st, 1857, they issued the policy now in suit. That policy covenanted on the part of the defendants to insure against fire the steam-mill, to the amount of \$1,000, for five years. It was accompanied by a premium note of \$250, on which \$12.50 was paid. At the time this policy was issued to James Mitchell, he was, in addition to the mortgage given by Boyle, largely indebted by judgments. There was also a mechanic's lien entered July 31, 1856. In the application made by Mitchell, and in response to the interrogatory in regard to liens, he said "there were none."

On the 5th July, 1857, Mitchell sold by articles of agreement to Ralston, Ellis & Carter (with a coal lot), for the consideration of \$16,000. On this article a large amount of purchase money was paid; and on the 20th July, 1857, Mitchell assigned and transferred the policy to Ralston, Ellis & Carter in due form. As the by-laws and schedule to the policy required all transfers to be approved by the secretary of the company, in accordance with that rule, the policy was transmitted to the secretary, and was by him approved and assented to on the 7th September, 1857. On the 20th July, the date of the day of transfer, Ralston, Ellis & Carter gave their premium note for \$250.

The mill was levied upon under process on these judgments issued to December term, 1858, and at that term was sold to John Watt for \$3,002.50, and the sheriff executed a deed to Watt, which was duly acknowledged in open court, on the 7th January, 1859.

On the 5th January, 1859, John Watt sold to David Ellis by articles, who paid the purchase money to the sheriff. On the 24th January, 1859, Ellis agreed to sell the one undivided half to Conrad Hoffman. On the 29th January, 1859, Ralston, Carter & Ellis assigned and transferred this policy to Ellis & Hoffman in the presence of Mr. McLain, the agent of the company, by him transmitted to the secretary, and by him approved and ratified on the 14th February, 1859, and a premium note was given by Ellis & Hoffman. All the assessments made from time to time upon the respective holders of the policy were regularly paid as they were made and demanded, and continued to be so down to the time of the loss and afterwards.

On the night of 1st August, 1859, the mill was entirely destroyed by fire.

Under this state of facts the defendants' counsel requested the court to charge the jury : —

1. James Mitchell having stated in his reply to the question in regard to incumbrances on the property insured, "there were none," and the records exhibited in this case showing a large amount of incumbrances, was such a fraud upon the company as avoids the policy as matter of law, and the plaintiffs cannot recover.

2. That the concealment of the large amount of incumbrances upon the property subsisting at the time that Ralston, Ellis & Carter procured the ratification of the transfer of the policy from James Mitchell, and not having disclosed those incumbrances to the defendants, or their agent, was such a fraud upon the company as would avoid that ratification, even if the policy was good in the hands of Mitchell.

3. That at the time of the ratification by the company of the several transfers to Ralston, Ellis & Carter, and Ellis & Hoffman, the respective assignees being possessed of equitable interests in the property insured, and the application not describing their interests as such, but insuring the same as owners of the fee simple, was such a misdescription of the interest in the same as will avoid the policy.

The court (Buffington, P. J.), after stating the facts of the case, charged the jury as follows : "The case has very properly been considered in reference to the three periods in the ownership in the policy. The first, while Mitchell held it ; the second, while Ralston, Ellis & Carter owned ; and third, the position of Ellis and Hoffman after their purchase, and the transfer of the policy to them, with the assent of the company.

"How was it, then, in the hands of Mitchell ? He made the application to the regular agent, he gave the premium note for \$250, paid the percentage and the cost, and in due course received this policy. If the matter rested here, it is probable there would have been less difficulty, perhaps no hesitation to pay. But it is contended that there was a false and fraudulent misrepresentation made by Mitchell to Mr. Sampson, the agent, by his answer to the question as to incumbrances, and that, in his application in writing, he said in substance there were no incumbrances.

"[I do not view the declaration of Mitchell, in the application, as a warranty, which requires a strict and literal compliance and

performance, but a representation merely. If that representation, however, was false and fraudulent, and of a nature calculated to mislead and deceive, it would equally avoid the policy as a false warranty. Whether there was a falsehood in this case is for the jury. From the evidence it appears there was. He answered in the written application that there was no incumbrance, whereas the evidence of the records shows very clearly there were quite a large number. Was this misrepresentation fraudulent? Was it calculated to deceive in a matter which the company deemed material? Was it wilful on his part, or simply the result of inadvertence? These are questions for the jury.] Its falsity, if the jury believe it, is a strong presumption of a sinister purpose and fraudulent design; but if the jury believe that the evidence rebuts that presumption and discloses an innocent purpose, they may so find it. If it was false and fraudulent, the policy would have been void in the hands of Mitchell, and if loss had occurred, then he could not have recovered.

“ We come to the second point : —

“ A void contract is one that has no validity whatever, as being against the policy of the law, or for other reasons, rendering it of no binding force. But a contract that is fraudulent and may be avoided by the party defrauded is good as to all other persons; and the guilty party, not being permitted to take advantage of his own wrong, is bound by it. It is, therefore, only the party wronged or cheated that can avoid it, and as to him and him alone it is invalid. It may turn out to be for his benefit, in which case he may treat it as good, and hold the other party bound. A private contract in general, in which the parties alone are interested, is therefore only voidable, not absolutely void; and as such we view this policy. If, at any period of Mitchell's ownership, the company alleged they were deceived and desired to avoid the policy, they could do so, if deceived by the hand of Mitchell. But they might ratify it, by agreeing to subsequent transfers to innocent assignees, and if they did so ratify it, with a knowledge of the facts made known either to the company or their agent, after such ratification they would be bound by the agreement in the hands of a *bonâ fide* holder.

“ These views apply equally to the transfer from Mitchell to Ralston, Ellis & Carter, and to the one from Ralston & Co. to Ellis & Hoffman, with the addition in the latter that Ellis told the agent, Mr. McLain, that he held under a sheriff's sale.

“The case then becomes one for the jury. We think that if the case rested on the policy in the hands of Mitchell, that the falsehood in the application, standing alone, would raise a presumption of fraud, and would avoid the policy. But the jury may find the representation to have been an inadvertence, if the evidence satisfies them to that effect. If the jury find the policy to have been good in the hands of Mitchell, then there is an end of this case [but if invalid in his hands, if the jury believe it was transferred to Ralston & Co., and by them to Ellis & Hoffman — that they were innocent holders and assignees — and that it was duly ratified by the company by approving of the transfer, and that they paid all the assessments demanded by the company from them, it would be a ratification, and they would be bound].

“If the jury find for the plaintiffs, the measure of damages is the \$1,000 in the policy, with interest from the time of loss, the 1st August, 1859.”

The points were answered as follows: —

“1. We cannot answer this point as requested. That there was a falsehood, the papers and record show. And the fact of its being false raises a strong presumption of fraud; still, whether wilful and fraudulent, is a question of fact for the jury, under all the evidence. Fraud is not an inference of law, but one of fact. The point is therefore answered in the negative.

“2. This point is answered in the negative, if there was a ratification.

“3. This point is answered in the negative.”

Under these instructions there was a verdict and judgment in favor of the plaintiff. The defendant thereupon sued out this writ, and assigned for error the answers given by the court to the points above, and so much of the general charge as is printed above in brackets.

The opinion of the court was delivered by

AGNEW, J. The first point of the defendants below is founded in a misconception that the application of Mitchell & Boyle formed a part of the policy for any other purpose than description of the property insured. At least in the absence of the policy, which the plaintiffs in error have not thought it worth while to furnish us upon our paper book, we can discover no more.

This clause is printed for us: “Reference being had to the ap-

plication of the same Mitchell & Boyle, which forms a part of the policy, for a more particular description of the property insured hereby." We take it for granted this clause follows immediately the statement in the policy of the property insured, and in this connection, therefore, was understood to make the application part of the policy for description and identification only, and not as containing any stipulation or warranty. The first point was constructed in view of the answer of Mitchell to the question in the application respecting incumbrances being a warranty; and asked the court therefore to say that the fact of existing incumbrances avoided the policy as a matter of law. The answer of the court leaving it to the jury as a question of fraud in fact, was correct. And viewing it as a false representation, as it undoubtedly was, the answer of the court was not erroneous. It is to be taken in connection with the general charge, in which the law is fairly stated to the jury, giving to the defendant below every advantage upon the facts, if the answer of Mitchell was found to be false, fraudulent, and material; all of which was necessary to avoid the policy on the ground of misrepresentation. We see no error in the answer to the second point. The policy was to run five years, and the assignment and ratification were within the term. So far as it appears on our paper book, there were no restrictions upon assignment or conditions to be performed by the assignee beyond that of procuring the consent of the company. Without that consent there could be no lawful assignment, but further than this we discover nothing calling upon the assignee to state the incumbrances. If there be anything in the act of incorporation or by-laws, it has not been set forth. Even against the party originally insured the policy cannot be avoided for incumbrances, unless upon his false and fraudulent answers to interrogatories, and much less can it be as to his assignee, who is not called upon to respond to any interrogatories.

There is no error in the answer to the third point. Our reasons are to be found in the opinion just delivered, in the case of *The Lycoming Insurance Company v. Mitchell & Boyle*, ante, 794. When the portion of the charge contained in the fourth assignment of error is read, as it must be, in connection with the remainder of the same paragraph, and with the last paragraph of the charge relating to the same subject, it will be found that the whole question of misrepresentation, its falsehood, its fraud, and

its materiality, was fairly left to the jury, to whom it belonged, as a question of fact, and that no error was committed.

The fifth assignment of error, in selecting one portion of the charge as error, leaves out of view what the judge had before distinctly told the jury. Ratification certainly ought not to be presumed without knowledge of the thing to be ratified. But the judge had only a moment before said to the jury that "they (the defendants) might ratify it (the policy), by agreeing to subsequent transfers to innocent assignees, and if they did so ratify it, with a knowledge of the facts made known either to the company or their agent, after such ratification they would be bound by the agreement in the hands of a *bonâ fide* holder." A contract of affirmance, founded on a misrepresentation, is not void, but only voidable. The insurers may avoid it, but are not bound to do so; and if they go on afterwards by recognizing it, and acting upon it, or by demanding and receiving payment of assessments, they waive the right to avoid, and must stand upon it.

The judgment is affirmed.

INDEX.

[Cases given in a syllabus merely are indexed by the page only.]

ACKNOWLEDGMENT OF RECEIPT.

See RECEIPT.

ACTION.

See REBUILDING, or p. 766 ; PARTIES ; also pp. 95, 285, 379, 408, 510, 733, 755.

ADDITIONS.

See INCREASE OF RISK, or p. 277.

1. A firm took out a policy of insurance upon merchandise contained in a "new frame barn, wagon, and wareroom," situated on an alley and occupied for a warehouse, and subsequently assigned their interest in the policy and property insured to others, who erected a brick addition of their storeroom (which was built upon the front of the lot, on the rear of which the frame barn was erected), extending it back to the alley, and requiring the removal of part of the barn : afterwards, the new building, and the remnant of the frame barn, with their contents, were destroyed by fire. In an action against the insurance company for the insurance upon the goods in the remnant of the barn and in the brick extension, it was *held*, that no recovery could be had, under the policy, for any loss of goods in the new brick building or extension of storeroom, and, if at all, only for those contained in the remnant of the frame barn and wareroom as originally erected and insured. *Lycoming Insurance Co. v. Updegraff*, 565.
2. *Construction.* — Where by indorsement on the policy at the time of building the brick extension it appeared that the insured had given their note for "carpenter's risk, and had paid five per cent. upon it, and upon the foot of the note a memorandum, that it was for additional risk in extending storeroom, the indorsement and memorandum cannot be construed into consent by the insurance company that any part of the frame barn should be torn down, or into any engagement to insure goods in the extension of the storeroom ; they amount to consent only that the storeroom on the front of the lot might be extended, thus increasing their risk, and were neither consent or evidence of consent that the frame barn might be extended, or that a part of it might be taken away. *Ib.*

ADJACENT BUILDINGS.

1. In an application, which was expressly made a part of the policy and warranty on the part of the assured, the applicant, in answer to a request to "state the relative situation as to other buildings," stated the distances, being respectively four and nineteen feet, of the two nearest buildings, and expressly agreed that the application was a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant." *Held*, that the failure to state the direction of the two nearest buildings, or to disclose other buildings a few feet farther off, not known to the applicant, nor to his agent who made the application, did not avoid the policy. *Hall v. People's Insurance Co.* 71.

2. *Non-disclosure.* — The by-laws of an insurance company, to which their policies were expressly made subject, provided that their risks should be distributed into four classes, one of which included "carpenters' shops;" that the application should be part of the policy, and "a warranty on the part of the assured;" and that an omission in the application to "make a true representation of the property, so far as concerns the risk and value thereof," should avoid the policy. An application for insurance on a building in a less hazardous class contained a covenant that it was "a correct description of the property, so far as regards the condition, situation, value, and risk of the same; and that neither the building described nor any other within one hundred and fifty feet is used for more hazardous purposes than is herein stated;" and this interrogatory: "What is the distance and direction from each other and from other buildings within one hundred and fifty feet, and for what purposes are said buildings occupied?" *Held*, that an omission to disclose a structure of rough timber forty-five feet long by twelve to eighteen feet high, within fifty feet of the property insured, made for the use of the carpenters employed to erect the building insured, did not avoid the policy, unless found by the jury to be a carpenter's shop, or unless, from the materials usually deposited therein, and the use to which it was devoted, its disclosure would have increased the premium of insurance. *Richmondville Union Seminary v. Hamilton Insurance Co.* 455.
3. *Breach of Warranty.* — Construction of the terms of a policy, whereby a false description or the omitting to make known any fact or feature in the risk which increases the risk was to render the policy void. The omission to mention a bleach-house separated from the building insured by a wooden shed-roofed building *held fatal*. *Day v. Conway Insurance Company*, 649.

ADJUSTMENT OF LOSS.

See pp. 589, 744.

1. *Where property covered by several policies of insurance is destroyed*, the proportion of its value to be paid by one underwriter is that which the amount of his policy bears to the amount of all the insurance thereon; although some of the policies cover other property in addition to this. *Blake v. Exchange Insurance Co.* 307.
2. Under a policy of insurance for \$2,000 on property insured elsewhere for \$3,000, which provides that "when property is insured by this company solely, three fourths only of the value will be taken, and in case of loss this company will be liable to pay three fourths only of the value at the time of the loss," and that, "in case of loss or damage of property upon which double insurance subsists, the company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount insured thereon, such amount not to exceed three fourths of the actual value of the property at the time of the loss," the underwriters are not liable for more than two fifths of three fourths of the value of the property. *Haley v. Dorchester Insurance Co.* 348.
3. *Construction.* — A policy of insurance contained the following condition: "Where property insured in this company is damaged by removal from a building in which it is exposed to fire, said damage shall be borne by the insured and insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant." A portion of the property insured was wholly destroyed by fire, and another portion damaged by removal. Action to recover all the damage sustained. The court instructed the jury "that the sum insured being \$2,500, and the value of the goods being estimated in the policy at \$5,000, the damage occasioned by the removal of the goods (if any) must be borne in the following proportions, under the condition above quoted. 'The plaintiff must bear one third of the loss, and the defendant two

thirds.' " *Held* to be error. The condition means that the damage occasioned by the removal of the property shall be borne by the parties according to their respective interests or risks, the share of either bearing the same proportion to the whole damage that his interest in the property or risk bears to the whole value. *Peoria Insurance Co. v. Wilson*, 497.

ADMINISTRATOR AND EXECUTOR.

See p. 59

AGENT.

See BILL OF REVIEW, or p. 7; GUNPOWDER, or p. 737; also pp. 12, 43, 150, 180, 204, 239, 242, 295, 316, 416, 553, 600, 628, 732, 766, 776, 789.

1. *Premises examined by.* — When premises insured against loss by fire have been thoroughly examined by the agent of the insurers, it is conclusive upon the insurers as to whatsoever is apparent. *Michael v. Mutual Insurance Co.* 29.
2. *Powers of.* — A general agent of an insurance company, who had authority to issue policies executed by the company, *held* to have power to add to a policy before the contract is completed a memorandum that the building insured is in the course of construction. *Gloucester Manuf. Co. v. Howard Insurance Co.* 32.
3. *An insurance agent is not necessarily the agent of the applicant in making out the application,* though instructed by the company to consider himself as such in so doing. *Beebe v. Hartford Insurance Co.* 55.
4. The fact that buildings have been on fire a number of times shortly before the policy on them was issued should be communicated to the insurers. But it is sufficient that the fact was made known to the company's agent, though the assured may not have gone into details in speaking of the fires. *Ib.*
5. On a motion for a new trial on the ground that the verdict is against evidence, it is not material that the precise number of such fires was not stated, especially if this was owing to the agent's lack of interest in the matter and his neglect to make inquiry. *Ib.*
6. *Powers of.* — An agent of one company reinsured a risk in another company, of which he was a director and secretary. *Held*, that the second contract was voidable. *New York Insurance Co. v. National Insurance Co.* 85.
7. The company's agent having been "duly authorized to take applications for insurance," has no authority under this grant to approve of subsequent insurances. *Wilson v. The Genesee Insurance Co.* 111.
8. An agent for an insurance company, empowered merely to receive written applications for insurance, to transmit them to the company, and, if they decide to take the risk, to receive the policy executed by them, and to issue it to the applicant, upon receipt from him of the premium, is not the agent of the company for the making of applications; and if employed by the applicant, or permitted to act for him in drawing up the application, is *his* agent, for whose mistakes of fact committed in the statements or answers to interrogatories in the applications, *he* is responsible. *Wilson v. Conway Insurance Co.* 113.
9. If, however, the agent, being empowered to *receive* and *transmit* written applications for insurance to the company, be requested by the applicant to copy the answers which he *shall* make in another application for insurance upon the same property taken away by him to fill up, instead of waiting until he receive from the applicant such answers to copy, send to his company an old application for insurance upon the same property corrected to suit the change of circumstances by himself, thus *sending* an application which he was not authorized by the applicant to send, the company is estopped from setting up the mistakes of fact in the application so mis sent by their agent in defence to a suit on the policy for loss under it. *Ib.*

10. The company cannot be affected with notice by verbal communications made by the applicant to an agent authorized only as above; and in a suit upon the policy for a loss, evidence of verbal communications of facts made to the agent varying from the statements in the written application is inadmissible to avoid the effect of misstatements or mistakes in the written application. *Ib.*
11. It is within the scope of the company's agent's powers to explain the questions of the application, and to decide for himself and the *bona fide* applicant what is a satisfactory answer, and how the answer should be applied to the subject. *Malleable Iron Works v. Phoenix Insurance Co.* 161.
12. The agent having incorrectly, and by mistake, answered one of the questions on his own supposed knowledge, and the applicant not knowing the fact: *held*, that the contract was not affected thereby, especially as the court regarded the statement as unimportant. *Ib.*
13. An under agent of an insurance company has no authority to issue a policy to or to make an agreement to insure himself. Nor has a general agent, to whom such under agent sends an application, any power to issue a policy on property after loss, though the application was made before, especially if the general agent knew of the loss at the time. *Bentley v. Columbia Insurance Co.* 264.
14. The knowledge of an agent for insurance of the existence of a material fact not stated by the applicant, *held* to be the knowledge of the insurance company in a case where there was no fraudulent concealment of the fact. *Campbell v. Merchants' Insurance Co.* 288.
15. Where it is shown that the company prepared the policy of insurance after a careful examination of the insured premises by their own surveyor, and with a full knowledge of the nature of the risk, *held*, that any misdescription of the policy was the fault of the company, and the insured should not be called upon to bear the consequences. *Benedict v. Ocean Insurance Co.* 462.
16. Authority of president. — The president of a mutual insurance company whose by-laws provide that no policy shall be delivered until after payment of the premium, and whose directors have voted that if premiums are not paid within sixty days from the dates of the policies, the policies shall be considered as cancelled, has no authority to waive these provisions; and such insurance company is not bound by assurances given by him to a mortgagee that a policy has been procured by the owner of the mortgaged property, and made payable to the mortgagee in case of loss, when in fact such policy has not been delivered in consequence of a failure to pay the premium. *Baxter v. Chelsea Insurance Co.* 525.
17. Knowledge of. — The company are not bound by knowledge of one of its officers acquired in his individual capacity merely. *Keenan v. Dubuque Insurance Co.* 619.
18. Power of. — If a policy of insurance has ceased to have any effect, by reason of the insured having kept prohibited articles in the house, a promise by the insurer's agent, having authority to adjust and pay losses, with knowledge that the prohibited articles were kept in the house at the time of the fire, will not bind his principal. *Phoenix Insurance Co. v. Lawrence*, 628.
19. A permit to run a factory nights granted by the company's agent, and a waiver of previous acts of the kind *held* binding on the company. *North Berwick Co. v. New England Insurance Co.* 790.

AGREEMENT TO CONVEY.

See p. 409.

ALIENATION.

See pp. 23, 330, 408, 409, 415, 447, 484, 565, 647, 653, 723, 793.

1. Assent. — Evidence. — A policy of insurance, made to the owner of a mill, "upon his

interest, being one half " thereof, provided that if the property should be sold or conveyed, in whole or in part, the policy should become void, but that the policy " might continue for the benefit of such purchaser, if the company give their assent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy." The assured afterwards obtained another policy from the same company on " his interest, being three tenths " of the same mill ; and then sold the whole property, and assigned the second policy to the purchaser by an indorsement thereon, which recited that he had " sold the within insured property " to him, and was assented to in writing by the company. *Held*, that this assent was not a sufficient certificate of the fact of sale, to continue the first policy in force ; and that oral evidence that the sale of the whole property was disclosed to the company before their assent to the indorsement upon the second policy, was inadmissible to support an action on the first policy. *Loring v. Manufacturers' Insurance Co.* 172.

2. *A sale of property insured does not avoid the policy, but only suspends it ; and a subsequent assent to an assignment thereof to the purchaser revives it.* *Hooper v. Hudson River Insurance Co.* 266.
3. *Alienation between partners.* — Three partners insured the property in question ; and one of them sold his interest in the firm to the other two without the consent of the underwriter. The policy prohibiting (without consent) " any transfer or change of title in the property insured." *Held*, that an action in the name of the three partners could not be maintained. *Dix v. Mercantile Insurance Co.* 380.
4. *Assignment in insolvency.* — An assignment under proceedings in insolvency, commenced by the debtor, is an alienation of his property, within the meaning of a stipulation in a mutual insurance policy, that " when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void ; " and defeats the right of a mortgagee to recover a portion stipulated by the policy to be paid to him in case of loss. *Young v. Eagle Insurance Co.* 417.
5. *A total alienation of property insured operates to avoid the policy of insurance, from the time of such alienation.* *Mount Vernon Manufacturing Co. v. Summit Insurance Co.* 432.
6. *Sale set aside.* — Where personal property insured against loss by fire in a mutual fire insurance company is sold by a master in chancery, in pursuance of a decree upon a mortgage given by the assured, and the proceeds of such sale are, by order of the court, applied to the satisfaction, *pro tanto*, of such decree, and the property insured is afterwards burned, the assured cannot recover for the loss, although subsequently to such loss and before the commencement of the action on the policy, the sale was, by consent of all parties thereto, set aside by order of the court under whose decree the sale was made. *Ib.*
7. *Mortgage.* — A mortgage is a material alteration in the ownership of property insured ; and, under a by-law of an insurance company which provides that " all alienations and alterations in the ownership, situation, or state of the property insured by this company, in any material particular, shall make void any policy covering such property, unless consented to or approved by the directors in writing within thirty days," will avoid a policy issued " under the conditions and limitations expressed in the by-laws," unless so consented to or approved. *Edmonds v. Mutual Insurance Co.* 540.
8. *Mortgage.* — A policy of insurance, one of the conditions of which is that " in case of any sale, transfer, or change of title in the property insured, such insurance shall be void and cease," is avoided by a conveyance which is absolute in form, though given as security for a debt merely. *Western Insurance Co. v. Ricker*, 604.
9. And where the insurance is upon a single building, and the conveyance is of an undivided interest only, the conveyance avoids the whole policy, notwithstanding

- the interest of the insured remaining unconveyed is shown to exceed in value the sum insured. *Ib.*
10. *In the absence of any prohibition of a transfer of interest*, the death of the insured and a renewal of the policy by the executors, and a conveyance of the property taking back a mortgage for the purchase money, does not avoid the policy. *Phelps v. Gebhard Insurance Co.* 624.
 11. *The constructive possession of the sheriff* by virtue of the levy of an execution upon goods which have been insured, where the insured retains the actual possession, does not vitiate the policy. Otherwise where a conveyance is made which terminates the interest of the insured in the goods. *Phoenix Insurance Co. v. Lawrence*, 628.
 12. *Assignment in trust.*—Although a policy of insurance contains a clause prohibiting “any transfer of the interest of the insured by sale or otherwise,” without the consent of the insurer, yet a deed made by the insured, conveying the goods to assignees in trust to pay creditors, will not render the policy void, the insured retaining the actual possession of the goods. *Ib.*
 13. *Mortgage.*—One of the conditions of the policy in suit provided that “in case of any sale, alienation, transfer, or change of title,” the contract should be void. *Held*, that a mortgage was not within the restriction. *Van Deusen v. Charter Oak Insurance Co.* 694.
 14. *Equity of redemption.*—The sale of an equity of redemption is, upon the expiration of the time for redemption thereunder, an alienation. *Campbell v. Hamilton Insurance Co.* 723.
 15. *Partition.*—Partition between co-tenants, *held* an alienation or change of title. *Barnes v. Union Insurance Co.* 728.

ALTERATIONS.

See CONSTRUCTION OF CONTRACT, or p. 300; also pp. 77, 315, 480, 655.

1. *Landlord and tenant.*—Where P., having effected insurance upon his dwelling-house, rented it to A., who built an addition to it, in which addition a fire originated which destroyed the whole building, and P. thereupon brought his suit against the underwriters, who resisted on the ground that there had been a material alteration by the “act of the proprietors,” within the intent of a certain section of their charter. *Held*, that that only is an act of the proprietor in the sense of the charter which the owner himself does, or authorizes to be done, or adopts as his before a loss accrues. *Held*, also, that it was properly left to the jury to determine, looking to all the circumstances, how far the owner had in fact authorized the alterations by the tenant. *Pudelford v. Providence Insurance Co.* 7.
2. *Semle*, that from the proximity of the owner's residence to the premises rented, the nature of the repairs and alterations made, and like circumstances, a jury is warranted in inferring his knowledge of and assent to the alterations. *Ib.*
3. *Steam-engine.*—The plaintiffs had effected with the Norwich Union Fire Insurance Society a policy of insurance, which contained (amongst others) the following condition: “Every policy issued by this society will be void, unless the nature and material structure of the buildings and property insured, and of all buildings which contain any part of the property insured, be fully and accurately described in such policy, and unless the trades carried on in all such buildings be correctly shown; and unless it is stated in such policy whether any hazardous goods are deposited in any such buildings; and whether there be any stove or apparatus for producing heat (other than common fireplaces in private houses), used or employed in such buildings, or in any building, yard, or other place adjoining or near to the property insured, and belonging to or occupied by the party insured; and if there be any building of a hazardous nature or structure, or in which hazardous trades are

carried on, or hazardous goods deposited, belonging to or occupied by the party insured, adjoining or near to the property insured, the same must also be specified in the policy, or it will be void." The plaintiffs, who were carriers, in 1843, erected on the premises insured a steam-engine, which they used for hoisting goods. This steam-engine was specified in the policy. The plaintiffs, in 1844, applied the steam-engine to grinding provender for their horses. They attached to it a horizontal shaft, which was carried through the floor to an upper room, where they erected winnowing and grinding machines. The policy was renewed in 1857. The society had no knowledge of the erection of the additional machinery or that the steam-engine was used for grinding. The premises having been destroyed by fire: *Held*, that the alteration did not avoid the policy, the jury having found that there was no increase of risk. *Baxendale v. Harvey*, 365.

4. *Consent*. — If a policy of insurance, issued by a mutual fire insurance company, contains a stipulation, that "If, subsequent to the making of the application, any new fact shall exist, either by a change of any fact disclosed in the application, the erection or alteration of any building," &c., "by the assured or others, or any change be made not named in the application and specifically permitted by the policy, the policy thereon shall be void, unless written notice be given to the directors, their written consent signed by the secretary obtained, and an additional premium or deposit paid," the policy will be avoided by the erection or alteration of a building upon the premises without obtaining a written consent signed by the secretary, or paying any additional premium or deposit. *Evans v. Trimountain Insurance Co.* 764.

AMOUNT OF RECOVERY.

See *DAMAGES*.

ANTEDATED POLICY.

Loss before policy made. — The parties agreed upon an insurance on the 20th of March, on the night of which the property in question was destroyed by fire. A policy was executed and delivered the next day; both parties being ignorant of the loss. *Held* binding. And this notwithstanding the usual provisions of the charter that all policies should be signed by the president, &c. *Davenport v. Peoria Insurance Co.* 776.

APPLICATION.

See p. 150.

A policy of insurance expressed to be issued on property described in a certain application, "which is hereby declared to be a part of this policy and a warranty on the part of the" assured, and to be "made and accepted in reference to the written and printed application whereon it is issued," is not void, if there was no written application ever made; nor if issued upon a defective application, if that application was correct so far as it went. *Blake v. Exchange Insurance Co.* 307.

ARBITRATION.

See pp. 299, 546.

1. *Evidence of a submission* by the assured and an agent of the insurers of the amount of a loss by fire to arbitration is not sufficient evidence of a waiver of a condition in a policy of insurance requiring a particular account of the loss, to charge the insurers in foreign attachment as trustees of the assured, if they state in their answers that they have never waived the conditions of the policy. *Pettengill v. Hanks*, 227.
2. *Notice of loss*. — Declaration against defendant, secretary of an insurance company, on a policy of insurance against fire, effected by plaintiff with the company. The

declaration set out in the policy, which was declared to be granted subject to certain conditions indorsed thereon; the fifteenth condition being as follows: "All persons insured by this company, sustaining any loss or damage by fire, shall forthwith give notice thereof to the directors or secretary of this company, at their office in M.; and, within fifteen days after such fire, deliver in as particular an account of their loss or damage as the nature of the case will admit of." "In case any difference or dispute shall arise between the insured and the company, touching any loss or damage, or otherwise in respect of any insurance, such difference shall be submitted to the judgment and determination of two indifferent persons as arbitrators, of whom one shall be chosen by this company, and the other by the insured; and such two arbitrators shall, previously to entering upon the reference, agree upon and nominate a third person to be an arbitrator with them; and the award in writing of any two of the three arbitrators so chosen shall be conclusive and binding on all parties; and if any fraud or false swearing shall appear on the part of the insured, and the same shall be certified in writing by any two of the said arbitrators, the party insured shall forfeit all claim under the policy." The declaration then averred a loss by fire, during the continuance of the policy, to the full amount insured; that plaintiff had done all things, and all things had happened, and all times had elapsed, to entitle him to have such loss make good by the company; of which the company had notice, but did not make good the loss. Plea 2. That plaintiff did not forthwith give notice of, or within fifteen days after the fire deliver an account of his supposed loss or damage by fire, as required by the policy and condition in that behalf. Plea 6. That this action is brought for and in respect of a difference and dispute between the insured and the company, touching the said loss and damage, within the meaning of the fifteenth of the conditions indorsed on the policy; and that the company have never declined, but have always been ready to refer such difference and dispute to the judgment and determination of two indifferent persons as arbitrators, in manner provided for by the said condition, of which plaintiff had notice before suit; and the said dispute or difference, and the amount of plaintiff's supposed loss or damage, have never been determined, as by the same condition is provided. *Held*, on demurrer to these pleas, that the second plea was good, but the sixth plea bad. *Roper v. London*, 375.

ARSON.

See p. 150.

Non-disclosure of attempts at. See p. 223.

ASHES.

Disposition of. — An application by a town for insurance on a school-house stated, in answer to an interrogatory, that the ashes were taken up in metallic vessels which were not allowed to stand on wood with ashes in them, and that the ashes, if deposited in or near the building, were in brick or stone vaults; and concluded with a memorandum that "if ashes are allowed to remain in wood, the insurers will not assume the risk;" and was made part of the contract of insurance. There were no vaults of brick or stone, and the ashes were generally deposited on the ground, at a distance from the building; but the boy employed by the school committee to take charge of the building, for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the school-house. *Held*, that the insurers were discharged. *Worcester v. Worcester Insurance Co.* 230.

ASSESSMENTS.

See pp. 150, 656, 732.

1. *Failure to pay.* — According to the by-laws of a mutual fire insurance company, if

the insured neglected, for ten days after demand to pay an assessment, the risk on his policy was suspended till the assessment was paid. The insured, fourteen months after the risk on his policy had been thus suspended, sold his property and assigned his policy to the purchaser; and the company, without giving notice to the assignee that the risk was suspended, or the assessment unpaid, assented to the assignment. *Held*, that the company must be considered to have waived their right to insist on the objection. *Hale v. Union Insurance Co.* 37.

2. The condition in an insurance policy issued to C. & Co., was as follows: "Any member of this company who shall have been assessed for the payment of any loss or damage by fire neglecting or refusing to pay such assessment for thirty days after he or she shall have had notice of the same, shall forfeit his or her policy, provided the premium note or notes deposited with the company, after paying any losses or expenses which may have accrued thereon, shall be given up to him or her on demand;" the policy was assigned January 13, 1855, the transfer approved by the company March 5, 1855, and the premium note of C. & Co. given up, and a new note taken from the assignees. An assessment had been made on the note of C. & Co., October 3, 1854, notice of which assessment was given to them and the plaintiffs, May 17, 1855; the assessment was not paid; in an action on the policy brought by the assignees to recover for a loss by fire, *held*, that the validity of the policy was not affected by non-payment of the assessment against C. & Co.; they not being members of the company when notice of the assessment was given to them. *Brannin v. Mercer Insurance Co.* 425.
3. A policy of insurance issued by a mutual insurance company, under the conditions and limitations expressed in the by-laws thereto annexed, one of which provides that the policy shall become void "if the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," is rendered void by the neglect of the assured to pay the amount of an assessment upon his premium note, for thirty days after a written request for payment, prepaid, duly directed and deposited by the company in the post-office, in due course of mail, would reach the place of his residence, as set forth in the policy, whether he received such request or not. *Lothrop v. Greenfield Insurance Co.* 542.
4. *Forfeiture. — Waiver.* — If, with full knowledge of a forfeiture, an insurance company collect assessments on the premium note of the assured, they thereby waive the forfeiture. *Keenan v. Missouri Insurance Co.* 547.
5. *Mortgage.* — Where one article of the by-laws of a mutual fire insurance company provided, "If any assessment required by the directors is not paid within thirty days after notice, the delinquent's policy shall cease and determine," &c., and another by-law provided, amongst other things, "Any policy of insurance payable to the mortgagee in case of loss shall continue so payable notwithstanding any alienation of the property of the mortgagor, made subsequently to such insurance. And such mortgagee shall pay any and all assessments on the property, provided the original assured shall not pay the same on demand," it was *held*, that the forfeiture provided by the former section did not apply to the case of a mortgagee to whom by the policy the loss was made payable; and that he might, in case of loss, recover thereon, although the policy had ceased, by neglect to pay an assessment within the thirty days, as to the mortgagor, whose interest was insured. *Francis v. Butler Insurance Co.* 596.
6. *Waiver.* — Assessment and collection of a sum upon a premium note, after knowledge of a violation of the contract, is a waiver thereof. *Keenan v. Dubuque Insurance Co.* 619.

ASSIGNMENT.

See ALIENATION, or p. 417; FRAUD AND MISREPRESENTATION, or p. 167; also pp. 23, 24, 37, 95, 187, 252, 269, 285, 333, 379, 408, 409, 416, 484, 510, 555, 565, 639, 656, 698, 723, 737, 793.

1. *It seems that an assignment of a policy issued by a mutual fire insurance company, made with the assent of the company, to a mortgagee of the property insured, does not make the assignee, until he has given a new deposit note, "the insured," within the meaning of a by-law of the company, suspending the risk on the policy in case of neglect of the insured to pay an assessment when duly demanded. Bowditch Insurance Co. v. Winslow, 1.*
2. *Assignee.* — One to whom has been assigned, with the consent of the insurers, all the interest of him to whom a policy is payable in case of loss, is not the assignee of the policy, and is affected by any subsequent acts of the assured. *Hale v. Mechanics' Insurance Co.* 59. See also *Grosvenor v. Atlantic Insurance Co.* 254; *Purple v. Resolute Insurance Co.* 698.
3. A mortgagee of real estate, to whom a policy of insurance thereon is made payable in case of loss, is not the assignee of the policy, and is affected by subsequent acts of the assured. *Loring v. Manufacturers' Insurance Co.* 173.
4. *Prohibition of.* — A fire policy containing a provision against assigning the same before or after loss, without assent, is avoided by an assignment after loss by one of several insured parties for the benefit of creditors. Such a prohibition is valid. *Dey v. Poughkeepsie Insurance Co.* 181.
5. *Notice of.* — An assignment of a policy, being of no avail except in case of an interest in the assignee in the subject insured, a request made to an insurance company to consent to an assignment to the plaintiff is notice to them that he had acquired, or was about to acquire, an interest in the insured property. And if the company desire to know the nature of that interest, it is incumbent upon them then to make inquiry. *Hooper v. Hudson River Insurance Co.* 266.
6. *Void policy.* — It does not render a void policy valid that it has been assigned with the consent of the company. *Eastman v. Carroll Insurance Co.* 322.
7. *A mutual company by a by-law* may provide that a mortgagee, to whom a policy is assigned for collateral security, may have the policy ratified to him by the assent of the directors, and that he shall thenceforth have all the rights of the assured. Under such a by-law, the mortgagee and assignee may sue in his own name, and is to be regarded in all respects as the party insured. *Barnes v. Union Insurance Co.* 716.
8. It is no defence that in the notice of loss it was not stated that the debt of the assignee as mortgagee was also secured on other property. *Ib.*
9. The assignee may give notice of loss. *Ib.*

"ASSURED."

See ASSIGNMENT, or p. 1; REINSURANCE, or p. 188.

BANKRUPTCY.

See ALIENATION, or p. 417.

BILL OF REVIEW.

The application in this case stated that it contained a full, just, and true exposition of the condition, value, and risk of the property to be insured, so far as material, and that the applicant held himself bound by the company's by-laws. The policy was also made subject to the by-laws; and these provided that the policy

should be void unless the true title of the insured should be expressed in the application, and that the applicant should be liable for the representations of any agent through whom the application was made. *Held*, that the policy was avoided by the omission to state the existence of a mortgage, though the fact was not material to the risk, and though the company's agent had knowledge of it; and this omission is ground for a bill of review. *Bowditch Insurance Co. v. Winslow*, 1.

BLOWING UP BUILDING.

See GUNPOWDER, or p. 451.

BUILDING.

See DISTANCE OF BUILDINGS; also pp. 315, 652, 675.

As a Chattel. See p. 755.

Cellar not a "story" of. See p. 462.

BURDEN OF PROOF.

See EVIDENCE.

BY-LAWS.

See PRELIMINARY PROOFS, or p. 528; also pp. 110, 481.

1. A plaintiff who, in a declaration against an insurance company on a policy issued by them by a name other than their own, "subject to the provisions, conditions, and limitation of the by-laws of said company," avers that the policy was so issued (which is admitted by the defendants in their answer), is bound by the valid provisions of the charter and by-laws of the defendants. *Nute v. Hamilton Insurance Co.* 63.
2. A notice to an insurance company claiming for a total loss of a wooden dwelling-house, without mentioning the stone work and bricks which were left unconsumed, is a sufficient compliance with a by-law which requires the insured, in case of partial loss, to state the amount of damage done, and the value of such parts as remain. *Wyman v. People's Insurance Co.* 531.

CAMPHENE.

See pp. 100, 330.

1. *Construction.* — A policy declared that the carrying on of any of the occupations mentioned in the hazardous, extra hazardous, or special rate classes in the building, or using it for storing or keeping any of the articles enumerated in these classes, should suspend the operation of the policy for the time, unless such use of the premises should be specially provided for therein, or should be afterwards agreed to in writing, to be added to or indorsed on the policy. This language, in connection with the statement annexed to the enumeration of the hazardous and extra hazardous occupations and articles, to the effect that a specified additional premium would be required where these more dangerous trades are carried on, and such combustible articles are kept, shows that it was not intended to exclude such employment and property from the privilege of being insured, but only that the insured parties, in respect to them, should pay such additional premium as was deemed adequate to the increased risk; and that the corporation should not be deemed to have assented to take that class of risks without an express provision to that effect. *Westfall v. Hudson River Insurance Co.* 4.
2. There being no such express provision, *held*, that the use of camphene for lighting purposes (camphene being one of the articles referred to in the above mentioned clauses) avoided the contract. *Ib.*
3. *Printing establishment.* — The written portion of a policy insured the plaintiffs "on

their printing and book materials, stock, paper, and stereotype plates, and printed books contained in certain buildings . . . privileged for a printing-office, bindery, and bookstore." Camphene "on sale" was included among the printed conditions in the class of extra hazardous articles, for which special rates were to be made. After this followed the clause: "Camphene, spirit gas, or burning fluid cannot be used in the building where insurance is effected, unless permission for such use be indorsed in writing on the policy, and is then to be charged an extra premium." Camphene was in ordinary use among printers for the purpose of their business, and the plaintiffs used it for the ordinary purposes of their printing establishment. The fire was caused by an accident in such use. *Held*, that defendants were liable. *Harper v. Albany Insurance Co.* 247.

CANCELLATION OF POLICY.

Notice.—One of the by-laws of a mutual fire insurance company, annexed to and made a part of its policies, provided, amongst other things, that it should "be optional with the company to terminate the insurance after seven days' notice given to the insured, or his representative, of their intention to do so," in which case, they were to refund a ratable portion of the premium. In winding up the affairs of the company, under a company vote to that effect, the directors and their committee ordered that the class of policies which included the plaintiff's should be cancelled on the 15th February, "or as soon after the date named as shall be found practicable, allowing for due notice to all parties, and reasonable time to procure new insurance." On the evening of the 13th February, but after the closing of the post-office, a notice, directed to the plaintiff, was deposited in the post-office informing him that all policies of the class of his would be cancelled on the 20th of February, and that from and after that date no member of the class would be held insured or liable to assessment. The plaintiff received this notice on the 14th February, and on the 22d February his property covered by the policy was destroyed by fire. *Held*, in a suit by him upon the policy, that he could not recover this loss, inasmuch as at the time of the loss his policy had been cancelled, and he had, within the letter and spirit of the by-law, received seven days' notice of the intent of the company to cancel his policy on a day subsequent to the giving of the notice. *Emmott v. Slater Insurance Co.* 700.

CAUSA PROXIMA.

1. *Loss by explosion not fire.*—It is the proximate, and not the remote cause of the loss, which is to be regarded in order to ascertain whether the loss is covered by a policy of insurance. *Caballero v. Home Insurance Co.* 478.
2. Where a fire occurs upon the premises insured, by which an explosion of gunpowder takes place, the insurer is responsible for the loss which is the direct consequence of the combustion. *Ib.*
3. Where the fire did not happen at the premises insured, but broke out in a building about two hundred feet distant, causing the explosion of gunpowder, which by the concussion of the air injured the building insured against fire, *held*, that such a loss could not have been within the reasonable intendment of the parties, and was not covered by the policy. *Ib.*

CELLAR.

Not one of the "stories" of a building. *Benedict v. Ocean Insurance Co.* 462.

CERTIFICATE OF MAGISTRATE.

See pp. 3, 166, 241, 408, 546, 693.

If the certificate of loss is received without objection, this is a waiver of the question of nearness. *Herron v. Peoria Insurance Co.* 601.

CERTIFICATE OF NOTARY.

See p. 546.

CHANGE OF OCCUPATION.

See OCCUPATION.

CHANGE OF TITLE.

Effect of lease. See p. 565.

CLOCKS.

See p. 37.

CONCEALMENT.

See FRAUD AND MISREPRESENTATION.

CONDITIONS.

See pp. 161, 166, 243, 417, 564.

1. The conditions attached to a policy of insurance are as much a part of it as if incorporated into the instrument itself. *Fire Association v. Williamson*, 154.
2. Where the value of the interest cannot be made within the time stipulated by reason of the nature of the subject matter of insurance, the requirement of such a statement is inoperative. *Stout v. City Insurance Co.* 556.

Waiver of. See p. 737.

CONSTITUTIONAL LAW.

Where action may be brought. See p. 647.

CONSTRUCTION OF CONTRACT.

SEE CAMPHENE; WARRANTY, OF p. 159; also pp. 31, 229, 247, 580, 646, 654, 776.

1. *Ambiguity.* — In construing the answers to the interrogatories in a printed application for fire insurance, although the proper meaning of the words is used to be first resorted to, yet the meaning attached by the applicant to them, clearly ascertainable from the connection in which he uses them, is to prevail over their proper meaning. Inaccuracies in the answers to such interrogatories caused by the ambiguity of the interrogatories, taken in their connection with each other, are to be charged to the account of the insurers who prepared the applications. *Wilson v. Hampden Insurance Co.* 128.
2. Where the applicant for insurance against fire on a cotton mill and machinery to previous questions had answered that the buildings, and machinery, with certain specified exceptions, belonged to one person — himself — and that certain machinery not to be insured in the policy belonged to one A. H., and that "the works" were not operated by the proprietors, but were rented; and in reply to this question, "Are they (the works) immediately superintended by one of the proprietors?" answers "Yes;" the answer is sufficiently verified by the fact that "the works" were superintended by the tenant, A. H., — in common parlance, a "proprietor," as distinguished from his employees, and who actually owned a part of the machinery run in the works, whether the meaning intended to be conveyed or actually conveyed by the answer, under the circumstances be considered. *Ib.*
3. *Alteration.* — A renewal policy, issued to an iron foundry company, describing their property insured, consisting of stock, tools, fixtures, cupola, flasks, and patterns, as "situate in the rear of 82 and 84 Eddy Street," construed not to confine the insurance to such property contained in the furnace building of the company,

although the application for the original policy did so confine it; the change in the description of the locality of the property to be insured having been made in the renewal policy, at the express request of the insured in their application for it, and being necessary to adapt the policy to the actual situation of a portion of the insured property, when placed, as usual, in the safe and convenient mode of conducting such business. *Eddy Street Iron Foundry v. Farmers' Insurance Co.* 300.

4. Such change also held, for the purpose of testing whether an answer of the insured, in the renewal application, "that there had been no alteration in or about the property to be insured material to the risk since the last application," was false, to be a change of the policy, and not an alteration in or about the property insured. *Ib.*
5. The renewal policy, thus changed, and, in addition, omitting one subject of the original insurance, — a steam-engine, — and distributing the amount to be insured differently amongst the remaining subjects of insurance, held, also, not to adopt the statement of the value of those subjects as stated in the application for the original policy. *Ib.*
6. *Hazardous trades.* — The usual clause prohibiting the occupation of the premises for the purposes of any trade denominated hazardous in the memorandum of special rates, declaring that "so long as the same shall be so appropriated, applied, or used," the contract shall cease, does not mean that the policy shall be rendered absolutely void by such occupation or use, but only that its operation shall be suspended for the time; and if no loss occur by reason of such use, the policy revives upon a discontinuance of the danger. *New England Insurance Co. v. Wetmore*, 656.
7. *Night work.* — It is no violation of the terms of a policy on a factory that it is sometimes run at night, where the insured stated in the application that it was "usually" worked certain hours of the day, "short time now." *North Berwick Co. v. New England Insurance Co.* 790.

CONSUMMATION OF CONTRACT.

See CONTRACT.

CONTIGUOUS MAGISTRATE.

See p. 546.

CONTIGUOUS NOTARY.

See p. 546.

CONTRACT.

When complete. See p. 164.

1. *When complete.* — The acceptance of a proposal to insure for the premium offered is the completion of the negotiation; and after the policy has been forwarded to the agent of the company for delivery, the contract cannot be rescinded without the consent of the insured. *Hallock v. Commercial Insurance Co.* 195.
2. If the premium is tendered to the agent when application for insurance is made, and he does not receive it, but says he will consider it as paid and authorizes the applicant to keep the money until the policy arrives, the contract will be as binding upon the company as if the money was actually paid to the agent. *Ib.*
3. If an insurance company take a risk to commence previous to the date of the policy, and the property is destroyed before the policy is actually executed and delivered, and there is no fraud or concealment by the party insured, the company will be as much bound as if the loss occurred after the policy was delivered. *Ib.*
4. A contract arises when an overt act is done intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not; and unless a proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given in a reasonable time. *Ib.*

Revocation of. See p. 453.

5. *When contract complete.* — On the 28th of March, 1856, the agent of an insurance company called at the house of the assured and proposed to insure it. A written application was made, and signed by the assured, and a receipt given to him by the agent, acknowledging payment of premium. The premium was not actually paid at that time, but it was agreed that the assured might hand it to the agent at his convenience. The assured was also told that his contract of insurance was complete from the date of the receipt, and that his policy would soon be ready. The receipt was dated March 28, 1857; the house was burned April 7, following, and the furniture wholly or partially destroyed. The premium was sent to the agent immediately after the fire, and he accepted the money, not knowing of the fire. The company made out, and sent a policy to the agent, but having heard of the fire, directed the agent not to deliver it, but to refund the premium. The agent declined to deliver the policy, and tendered back the premium, which the plaintiff declined, and thereupon brought suit for specific performance. *Held*, that the contract was binding from the 28th March. *Whitaker v. Farmers' Insurance Co.* 385.
6. The defendants' charter provided that applicants, before receiving a policy, should "deposit their promissory note . . . a part of which, not exceeding ten per cent., shall be immediately paid." It was further provided by the by-laws that policies should take effect at noon of the day of approval, and should thereafter be binding, provided the premium or ten per cent. thereof was paid, and that the ten per cent. payment should always be made and indorsed on the policy. *Held*, that the giving the premium note and payment of ten per cent. thereof were conditions precedent to the liability of the defendants. *Wallingford v. Home Insurance Co.* 467.
7. If the by-laws of a mutual insurance company provide that "each person, before the policy shall be binding on the company, shall pay to the treasurer or agent such premium, and make such deposit as the directors shall determine," the company is not rendered liable on a policy which is executed but not delivered, and for which no premium has been paid, by an oral promise of their treasurer to the applicant for insurance that, if anything should happen, he would see the premium paid, or that he would take it upon himself to keep the policies good. *Buffum v. Fayette Insurance Co.* 582.
8. *Oral contract. — Defective policy.* — An oral contract of insurance, to take effect forthwith, though entered into contemporaneously with an agreement for a written policy, is binding until delivery or tender of such policy. *Kelley v. Commonwealth Insurance Co.* 641.
9. The terms of the written policy as to prepayment of premium have no effect in such case unless expressly adopted. Nor will a mere demand of payment without tender of a policy supersede the verbal contract. *Ib.*
10. Under such oral contract the insured may recover for a loss, though after it occurred, and while the insurers were ignorant of it, he paid them the premium and received a written policy which was not binding on them by reason of not being properly executed. *Ib.*
11. *Completion of contract. — Oral renewal.* — A policy having expired, and the insured desiring a renewal, he was told by the secretary of the company that the insurance would be granted, and he would send the policy on the following Monday morning. A loss having occurred in the mean time; *held*, that a jury were authorized in finding the company liable. *Audubon, executrix, v. Excelsior Insurance Co.* 696.

CONTRIBUTION.

See pp. 646, 789.

COVENANT.

A proper remedy on a renewal. See p. 601.

To insure. See p. 766.

CRYSTAL PALACE.

1. The defendants insured the building known as the Crystal Palace in New York city. *Held*, that as the character of the building, and the use to which it was put as a place for public exhibitions of industries were well known, and as it was described in the policy as the building lately owned by The Association for the Exhibition of the Industry of all Nations, and as the defendants had insured property in it belonging to exhibitors, the defendants could not object to the use of any of the usual and necessary means for carrying out the purposes of the building. *New York v. Hamilton Insurance Co.* 675.
2. Goods placed in such a building for the purpose of exhibition, are not "stored." *Ib.*
3. What constitutes an increase of risk in such a case, so as to avoid the policy, and what does not. *Ib.*

CUSTOM.

See **POLICY**, or p. 485.

DAMAGES.

See pp. 23, 28, 187, 229, 325, 512, 647, 789.

1. *Report of committee as to loss.* — The report of a committee of a mutual insurance company, appointed by the president in accordance with the provisions of the act of incorporation, to examine and inquire into a loss, and after ascertaining the sum to which the insured is entitled to make provision and payment thereof, is not conclusive of the amount of the loss in an action by the insured against the company on the policy of insurance. *Insurance Co. v. Rupp*, 327.
2. *Goods in trust.* — Plaintiffs, common carriers, insured goods against fire in an insurance company of which defendant was treasurer. By a condition indorsed on the policy, "goods held in trust or on commission" were "to be insured as such, otherwise the policy" would "not extend to cover such property." By the policy, £15,000 was declared to be insured "on goods their" (plaintiffs') "own and in trust as carriers" in a certain warehouse; and it was stipulated that the funds of the insurance company were to be "liable to pay, reinstate, or make good" "to the" "assured" "all damage and loss which the" "assured" should "suffer by fire, on the property" therein "particularized." Another of the conditions indorsed ran thus: "In every case of loss duly proved, the company will either reinstate the property, or the assured shall receive satisfaction to the amount thereof, without discount or deduction." *Held*, in an action on the policy, that, to the named amount, the whole value of goods in the warehouse, in plaintiffs' possession as carriers, was insured by it, and not merely plaintiffs' interest as carriers in such goods. That plaintiffs were entitled to recover the whole value of such goods destroyed by fire in the warehouse; although as the value of such goods exceeded £10, and the owners had not declared such value to plaintiffs, plaintiffs were not liable to the owners for such loss by reason of the Carriers' Act, stat. 11 G. 4 and 1 W. 4, c. 68, § 2. *London and Northwestern Railway Co. v. Glyn*, 341.
3. *Two thirds clause.* — In an action upon a policy of insurance in which the insurers promise to pay the insured all losses or damage . . . not exceeding \$2,500, that may happen by fire to their stock of goods; and providing also that the losses or damages be estimated at the actual value of the property at the time the same shall happen, and be paid at the rate of two thirds its actual cash value. *Held*, that the losses or damage being found to be the amount of \$2,500, and that such sum

was less than two thirds of value of the stock of goods, the insured are entitled to recover the full amount of \$2,500, although that sum is the full amount of the insurance. *Ashland Insurance Co. v. Housinger*, 428.

Value of property. See p. 545.

4. *Rebuilding.* — A wooden building situated within the fire limits of Detroit was injured by fire, and by the ordinances of that city could not be repaired without the consent of the common council. This consent was refused. The building was insured for \$2,000, and the policy contained a clause that in case of loss or damage to the property it should be optional with the company to rebuild or repair the building within a reasonable time. The cost of repairing the building would be much less than the amount of the insurance, but without leave to repair, the building, which before the fire was worth \$4,000, would now be worth less than \$100. It was held that the insured was entitled to recover the whole insurance, and was not limited to such sum as would cover the cost of repair. *Brady v. Northwestern Insurance Co.* 668.

DELIVERY OF POLICY.

See p. 154.

DISTANCE OF BUILDINGS.

See p. 315.

Warranty. — If an application for insurance is expressly made a part of the policy, and a warranty on the part of the insured, and contains a clause inserted after the printed questions by which the applicant "covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for, or material in reference to this insurance," and the by-laws, which are also expressly made a part of the policy, provide that "unless the applicant for insurance shall make a correct description and statement of all facts required, or inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, the policy issued thereon shall be void," the applicant must be held to warrant that all facts inquired for are correctly given, whether material or not; and the omission to mention several buildings within one hundred feet of the property insured, in reply to a question, "What is the distance of said building from other buildings within one hundred feet, and how are such other buildings constructed and occupied? Annex a ground plan to the application;" will avoid the policy. *Tebbetts v. Hamilton Insurance Co.* 534.

DOUBLE INSURANCE.

See pp. 48, 105, 166, 241.

1. *Estoppel.* — A double insurance having been obtained contrary to the terms of a policy, the circumstances considered as to whether the defendants were estopped to set up the facts in an action on the policy. *Fabyan v. Union Insurance Co.* 108.
2. *Amount of liability.* — The by-laws of an insurance company, to which a policy was made subject, provided that in case of double insurance the company should be liable to pay only such proportion thereof as the sum insured by them should bear to the whole amount insured thereon. Upon the face of the policy were written the words, "Additional to \$9,000 insured in other offices, and \$8,000 to be insured in other offices. The application for insurance stated that there was \$9,000 already insured, and "\$8,000 wanted in other companies." Held, that the company's liability was to be calculated by the amount of insurance actually procured, and not by the amount thus stated. *Richmondville Seminary v. Hamilton Insurance Co.* 455.

EQUITY.

See ALIENATION, or p. 723; MISTAKE; also pp. 410, 600.
Of redemption. See p. 699.

ESTOPPEL.

See pp. 484, 554, 707.

After the underwriter has acknowledged by his acts and conduct the interest of the assignee of a policy, he will not be permitted to deny the same on the trial. *New England Insurance Co. v. Wetmore*, 658.

EVIDENCE.

See OTHER INSURANCE, or p. 223; also pp. 48, 149, 242, 268, 285, 287, 348, 406, 415, 461, 580, 606, 640, 651, 723.

1. *The burden of proving* the breach of a promissory warranty in a policy of fire insurance is not upon the insurers; on the contrary, the burden of proving a compliance therewith is upon the assured; and hence the declaration on a policy for a loss under it should aver the performance of such and all other warranties of the assured, — a requisite of the declaration sufficiently satisfied by a general averment, that all things have happened which it was necessary should happen to entitle the plaintiff to recover the loss. *Wilson v. Hampden Insurance Co.* 128.
2. *Bonfire*. — In the trial of an action on a policy of insurance upon a building in which was a quantity of straw at the time of the fire, the defendants cannot, "for the purpose of showing the condition of the straw at the time," introduce evidence that three weeks previously a bonfire was made by boys outside of the building, with a trail of straw from it to the building, in which loose straw was then lying. *White v. Mutual Assurance Co.* 216.
3. *A hog-pen and hen-house*, from three and a half to six feet high, covered with boards, with a partition of boards between them, are not a building within the meaning of an application for insurance, which represents that there are no buildings not disclosed within a certain distance; and evidence that they increased the risk is inadmissible. *Ib.*
4. *Ambiguity*. — Parol evidence held admissible to show that certain other policies upon goods "in the building," the chambers of which only were occupied by the plaintiff, did not cover the goods of the plaintiff in said chambers. *Storer v. Elliot Insurance Co.* 319.
5. *To whom money payable*. — A policy of insurance to "K. and others" on stock in process of manufacture, may be shown by parol evidence to have been issued to a corporation in which K. was a stockholder, having no other title in the property; and upon proof of that fact an action may be maintained thereon by the corporation in their own name; and evidence that before the policy was issued K. owned the property and had made an agreement to sell it to them, under which they had entered into possession, and carried on alone the business of manufacturing, and the application for insurance was made by one of their directors, who procured the insertion of a provision therein making it payable to the corporation in case of loss, tends to prove that fact. *Shawmut Sugar Refining Co. v. Hampden Mutual Insurance Co.* 361.
6. *It is no evidence of waiver* of a by-law of a mutual fire insurance company, requiring the assured, before the delivery of any policy, to pay such premium and give such deposit note as the president and directors shall from time to time determine, that the policy was made out and recorded in the company's books, pursuant to an agreement between the person to be insured and the president of the company; that the directors had previously voted "that the premiums on all policies shall be

payable within thirty days from the date of said policies, and if not paid within sixty days the policy shall be considered cancelled;" that, both before and after sixty days from the date of this policy, the president and secretary requested this person to pay the premium, without suggesting any invalidity of the policy; and that, after a loss of the property insured, an assessment was laid to cover it. *Brewer v. Chelsea Insurance Co.* 420.

7. *Diagram.* — In an action upon a policy of insurance the defendants put in evidence a diagram of the property insured, without date or signature, but referred to in the application as of a certain date and sent to them by a certain person. *Held*, that the admission of a letter so dated and signed, and which had accompanied the diagram, as containing representations made by the plaintiffs, but not as proof of any facts therein stated, was unobjectionable. *Richmondville Seminary v. Hamilton Insurance Co.* 455.
8. *Proof of an application for insurance and of a policy* issuing thereon, both of which describe the property insured as property of the plaintiffs, is *prima facie* evidence of title and of an insurable interest in the plaintiffs, in an action upon the policy. *Nichols v. Fayette Insurance Co.* 520.
9. When one of the plaintiffs has taken an assignment of a first mortgage on the insured property, in trust for all the plaintiffs, and has completed a negotiation for the purchase of the interest of the mortgage in a second mortgage, under which the title has been perfected by a foreclosure, a statement by the plaintiffs in the application for insurance that they are mortgagees in possession will not avoid the policy. *Ib.*
Weight of. See p. 758.
10. *Certificate of loss.* — Where a condition of a policy of insurance requires the insured to deliver an account of their loss with their oath or affirmation declaring the account to be true and just, &c., the affidavit of the insured is admissible to prove a compliance with such condition, but for no other purpose, and the court should so inform the jury. *Phoenix Insurance Co. v. Lawrence*, 628.
11. The conditions and enumerations of hazards form parts of the policy, and if articles prohibited by the policy (whether by provisions in the body of it or annexed to it) are kept by the insured, the burden is not upon the insurer to show that the keeping thereof caused the loss or increased the risk. But the keeping of such articles by the insured, when the policy was obtained, did not render it void unless they concealed that fact from the insurer. *Ib.*

EXAMINATION UNDER OATH.

See p. 545.

EXECUTOR AND ADMINISTRATOR.

See p. 595.

Executors to whom real property is devised have an insurable interest therein. *Phelps v. Gebhard Insurance Co.* 624.

EXPERTS.

See pp. 31, 414.

The opinion of a witness skilled in insurance cannot be taken as to the effect upon the risk of having a house unoccupied. *Joyce v. Maine Insurance Co.* 317.

EXPLOSION.

See GUNPOWDER; also p. 496.

FALL OF BUILDING.

Subsequent fire. — Insurance against fire was effected on goods "contained in a granite

store;" one of the walls gave way, and half of the store and the whole of the adjoining building fell; before there was time to remove the goods, fire broke out in that building. *Held*, that the insurers were liable for damage from fire, and from water used to extinguish it, to goods not displaced or injured by the fall. *Lewis v. Springfield Insurance Co.* 239.

FALSE SWEARING.

See OVERVALUATION; also p. 652.

1. The plaintiff held not required by the conditions of the policy to sign the instrument presented by the company's secretary. *Held*, also, that the excess of the plaintiff's claim, as furnished to the company, over the verdict, did not show him to have been guilty of "false swearing." *Held*, also, that by "false swearing" was meant the swearing to a false statement knowingly. *Franklin Insurance Co. v. Culver*, 13.
2. The usual provision as to false swearing refers to false statements as to material matters wilfully made, with intent to deceive. *Marion v. Great Republic Insurance Co.* 744.

FIRE HEAT.

See REFORM OF POLICY, or p. 204.

FIXTURES.

See POLICY, or p. 185; also p. 25.

"FOR ACCOUNT OF WHOM IT MAY CONCERN."

Plaintiffs effected a policy "for whom it may concern." *Held*, that the policy covered their interest in the building. *New York v. Hamilton Insurance Co.* 675.

FORCE PUMP.

See p. 187.

FOREIGN COMPANIES.

See p. 693.

FORFEITURE.

See p. 348.

Waived by receiving a new premium with knowledge. *North Berwick Co. v. New England Insurance Co.* 790.

FRAUD AND MISREPRESENTATION.

See ARSON, or p. 223; also pp. 23, 31, 43, 150, 213, 242, 287, 295, 316, 378, 388, 409, 464, 481, 510, 512, 552, 555, 646, 706, 707, 730, 776.

1. *Statements of company's agent.* — A policy of insurance was effected upon a stock of store goods, it being stipulated in the conditions of insurance that "a false description by the insured of a building or its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same," shall render the policy void; and the survey or description shall be taken "to be a warranty on the part of the assured." It was also agreed in the application for insurance that any misrepresentation or concealing of facts in effecting the insurance shall render the insurance void. The store was described as containing a chimney and stove-pipe, passing "through crock and well secured;" whereas, there was no chimney

- and no crock ; and in the night of the day after a fire was kindled in the store, the storehouse and goods were burned, no proof being made as to the cause of the fire. *Held*, that the policy was void ; and that, too, though the statements were known to be false by the company's agent, who prepared the description as made, and informed the plaintiff that it was only necessary to construct the chimney and secure the pipe before putting fire into the building, especially as this was a mutual company. *Smith v. Cash Insurance Co.* 43.
2. *Incumbrance*. — A misrepresentation in an application to a mutual fire insurance company that there is no incumbrance upon the property, avoids the policy, although such incumbrance has been placed upon the property by another than the insured. *Battles v. York Insurance Co.* 151.
3. *Assignment*. — An application to a mutual fire insurance company for insurance on buildings contained the following question and answer : " State whether or not incumbered, to whom, and to what amount ? " " Mortgaged for \$2,000 on the buildings, land, &c. ; value, \$7,000 ; " and concluded with an agreement of the applicant " that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk ; and in case of insurance he holds himself bound by the act of incorporation and by-laws of the company." The policy was also made subject to the provisions and conditions of the by-laws ; and one of the by-laws provided that the policy should be void, unless the true title of the assured should be expressed in the application. The policy also expressed the intention of the company to rely on their lien on the interest of the insured in the buildings and the land under the same. At the time of the application the land on which these buildings stood, and a larger piece of land, owned by the same person, but separated by a court laid out between them by the owner, were both subject to a mortgage for \$2,000 to J. S., and to another mortgage for \$800 to another party ; and the value of the first piece of land and buildings was \$7,000. The assured afterwards indorsed upon the policy an assignment reciting his " having mortgaged the property within mentioned to J. S.," and assigning the policy to him as collateral security, and the company assented in writing to this assignment. *Held*, that the failure to disclose the mortgage for \$800, in the original application avoided the policy in the hands of the assignee. *Bowditch Insurance Co. v. Winslow*, 167.
4. *Bill of sale*. — An applicant for insurance on personal property, who has made, but not delivered, a bill of sale thereof, taking in return only a promissory note secured by mortgage thereon, may truly represent and warrant himself to be the owner thereof. *Vogel v. People's Insurance Co.* 213.
5. *Two partners* in an application for insurance on a building, which was required to contain " a full, fair, and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk," stated that they owned the land on which it stood. In fact one of them, to whom the policy was made payable, owned it, and the other was charged on their books with half its cost. The partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his copartner, to whom the insurers, with notice of the facts, agreed that the policy should " stand good." *Held*, that the insurers were liable for a loss by a subsequent fire. *Collins v. Charlestown Insurance Co.* 236.
6. *A description* in an application for insurance of a building as used " for the manufacture of lead pipe," or " of lead pipe only," includes the manufacture of wooden reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe. *Id.*
7. *Watchman*. — In a policy of insurance upon a saw-mill, the assured covenanted " that the representation given in the application for this insurance contains a just,

- full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void." The applicant, to a question, "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered, "A good watch kept; men usually at work. Watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?" In fact, no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to, and habitually did, examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises. *Held*, that the term "good watch" must be interpreted to mean "suitable" or "proper watch;" and that it was for the jury to decide whether the watch kept was a suitable and proper one, and whether the risk was affected by the watch actually kept as compared with the one stipulated for. *Parker v. Bridgeport Insurance Co.* 243.
8. *Title. — Non-disclosure.* — An application made to a mutual insurance company, in a printed form issued by them, by one of their agents, without knowledge of the person to be insured, for insurance on a building, stated that "the property to be insured" belonged to him; when in fact he owned the building only, and was a mere tenant at will of the land on which it stood. A policy was issued thereon, expressly made subject to the lien of the company on the interest of the assured in any personal property or buildings insured and the land under such buildings, upon which lien the company expressed their intention to rely; and to the by-laws, the conditions of which were declared to be part of the policy; and provided that the application should be a part of the policy and warranty on the part of the assured, that any policy should be void "unless the true title and interest of the insured be expressed in the proposal or application," that "property held by lease, or standing on land so held, shall not be insured, unless specially described as such in the application;" that "in case the application is made through an agent, the applicant shall be held liable for the representation," and that "no insurance agent or broker forwarding applications to this office is authorized to bind the company in any case whatever." *Held*, that the assured by accepting the policy adopted the representations of the agent; that the failure to specify the nature of his interest avoided the policy; and that parol evidence of the agent's knowledge of the actual facts is inadmissible. *Kibbe v. Hamilton Insurance Co.* 295.
9. *Entire contract.* — One note being given for a specified insurance on a stock of goods and a further sum on a store containing them; *held*, that the contract was entire, and that a misrepresentation as to the title of the building avoided the policy *in toto*. *Lovejoy v. Augusta Insurance Co.* 326.
10. In an application, made part of a policy of insurance on property in the second story of a large building, and providing that the description therein given is a full and true description of the property to be insured and of all circumstances in relation thereto, material to the risk, and that the questions not answered shall be construed most favorably to the risk, an omission, in answer to the question, "Who occupied it?" to state the occupation and occupants of all the rooms, does not avoid the policy, if the jury are satisfied that those not disclosed make the risk less hazardous than it would have been if the whole building had been occupied as stated in the answer. *Haley v. Dorchester Insurance Co.* 348.
11. *Warranty.* — An application for insurance, in which the applicant agrees that it is "a correct description of the property, as far as regards the condition, situation, value, and risk on the same," and that "the misrepresentation or suppression of

material facts shall destroy his claim for damage or loss," is not a warranty of the truth of the answers to interrogatories in it, except so far as they are material to the risk; although the by-laws, to which the insurance is expressly made subject, provide that the application shall be held to be a part of the policy, and "a warranty on the part of the assured," and that "unless the applicant shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, the policy shall be void." And the materiality of any answer is to be determined by the jury. *Elliott v. Hamilton Insurance Co.* 388.

12. *Non-disclosure.* — Where specific descriptions of the property are required by the terms of an insurance office, which are referred to and incorporated as part of the conditions of the policy of insurance, *held*, that the suppression of an immaterial fact does not invalidate the policy. *Whitehurst v. Fayetteville Insurance Co.* 403.
13. *Representations by third person.* — A policy of insurance was declared upon its face to be "made and accepted in reference to the survey on file at this office;" and was afterwards renewed "upon condition that the application, upon which said policy was originally predicated, shall continue valid and in full force." The policy had been issued upon an application for insurance headed with the name of another insurance company, and signed by the president of that company, who delivered the application to this company and procured the original policy and the renewal of it; but there was no other evidence that the application was made with the authority or knowledge of the assured. *Held*, that the assured was not bound by the statements in the application as to the precautions to be taken against fire; nor by representations made by such president, at the time of procuring the renewal, as to the amount of other insurance. *Denny v. Conway Insurance Co.* 410.
14. *Misrepresentation by company's agent.* — The company's agent, on request for insurance by letter from the plaintiff, made out an application containing a material misrepresentation, — the fact not having been known to the plaintiff. *Held*, that the policy which thereupon was issued was void. *Richardson v. Maine Insurance Co.* 441.
15. *The non-disclosure of the fact that goods insured are kept in the name of the insured and another, will not affect the validity of a mutual policy, where the insured is sole owner of the goods.* *Gould v. York Insurance Co.* 448.
16. *The existence of a mortgage on property insured which is described as unincumbered avoids the policy; and held immaterial whether the existence of the mortgage was known or not to the assured.* *Ib.*
Ownership. See p. 461.
17. A false statement of something outside, and independent of the property insured, will not avoid a fire policy. *Howard Insurance Co. v. Cornick*, 474.
18. *Stoves.* — In an application for an insurance, in which the location and description of the neighboring buildings was properly given (one of which was a carpenter shop), it was *held* that an omission to state that the shop was heated by stoves, or to say what provision was made for warming, was neither a fraudulent concealment of material facts, nor a breach of the covenants of the assured party; unless perhaps the heating was effected in an unusual and extraordinary manner. *Girard Insurance Co. v. Stephenson*, 513.
19. *Mortgage.* — An application by a mortgagee in possession for insurance "on dwelling-house," which contains no direct question or statement as to his title; but, in reply to a question as to incumbrances, states as follows: "First mortgage to M. W. (the name of the plaintiff), entered October, 1855;" and, in reply to a question, whether the property is insured, states as follows: "Not on first mortgagee's interest;" does not disclose such a want of true representation of the title of the applicant as to avoid the policy, although the by-laws require him to state his true title. *Wyman v. People's Insurance Co.* 531.

20. *Non-disclosure.* — On a condition in a policy, that it should be void if the assured should omit to communicate any matter material to be made known to the insurer, *held*, that this meant some matter not only material, but also unknown to the insurers; and that it did not apply to something which it might well be presumed was known to them or their agents. *Pimm v. Lewis*, 585.
21. *Title to property.* — A person is not bound to specify his interest in the property insured unless inquiry is made. *Phelps v. Gebhard Fire Insurance Co.* 624.
22. A firm obtained insurance upon a storehouse, and the stock of goods therein, for a separate sum. The interest of the insured in the house was incorrectly described in the policy as belonging to the firm, whereas it was the property of one of its members. In a suit brought to recover for the loss of the goods, *held*, in the absence of proof that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods, that this does not vitiate the insurance on the goods. *Phoenix Insurance Co. v. Lawrence*, 628.
23. *Material misrepresentations.* — Under St. 1861, c. 152, which provides that "in all insurance against losses by fire the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company, as such, shall be considered as a warranty or part of the contract," an express condition in the body of a policy that the application contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as the same are known to the insured and material to the risk, will authorize the company to resist payment of a loss on the ground that the application contained material misrepresentations in those respects. *Barre Boot Company v. Milford Insurance Co.* 703.
24. *When property held in trust.* — If one who holds property by a deed absolute on its face give an agreement to reconvey upon being indemnified for liabilities for which the deed was given, he holds the property in trust. *Day v. Charter Oak Insurance Co.* 725.
25. The requirement that the insured should accurately state the nature and extent of his interest is only fulfilled, when the property consists of several parcels in which his interest is not alike in all, by a statement of his interest in each. *Id.*
26. It is error to submit to the jury the question of notice to the defendant of over-insurance, when the evidence shows that none was given to the company or its authorized agent, but only that the fact was ascertained by the agent of another insurance company while transacting business for his principal, and was not communicated to the defendant. The rule which requires an applicant for insurance to set forth the nature of his interest in the property to be insured does not extend to assignments of policies while in force; hence, it was not error to charge the jury in an action on a policy for the use of persons to whom it had been assigned, that the omission of the latter to inform the company of the extent of their interest in the property, at the time of the transfer or renewal of the policy, would not prevent a recovery, if the defects in title or otherwise were waived by the proper agent of the company. *Lycoming Insurance Co. v. Mitchell*, 794.
27. *Incumbrances.* — In an action on a policy of insurance, where the defence rested on a false representation by the party insured, as to the existence of incumbrances on the property, it was *held* not error in the court to refuse to instruct the jury, as matter of law, that it was such a fraud on the company as would avoid the policy. Whether the false representation was or was not wilful and fraudulent, was a question of fact for the jury, under proper instruction as to the effect of such a representation. *Cumberland Valley Protection Co. v. Mitchell*, 801.
28. Nor was it error to refuse to charge the jury, that the concealment of the existence of incumbrances, at the time when the ratification of the transfer of the policy was procured, was such a fraud on the company as would vitiate the policy in the hands of the assignee. *Id.*

29. It is not necessary that the interest of persons in the property insured be stated, when application is made for the ratification of the transfer of a policy of insurance. *Id.*

30. A contract of affrmance founded on misrepresentation is voidable but not void, and if an insurance company, after knowledge of the facts, recognize the existence of the contract by acting upon it, demanding and receiving payments of assessments under it, they thereby waive all right to avoid it. *Id.*

FRICTION MATCHES.

See p. 330.

FURNACES.

See p. 655.

GAS.

See p. 100.

GOODS IN TRUST.

See DAMAGES, or p. 341; also p. 776.

Plaintiff made with defendants a policy of insurance against fire, in which plaintiff was described as a corn and flour factor; the policy was, amongst other things, on goods in his warehouses, and on "goods in trust or on commission therein." The defendants covenanted to make good any damage by fire to the property insured. The plaintiff was a wharfinger and warehouseman. He had in his warehouses goods belonging to his customers, which were deposited with him in that capacity, and on which he had a lien for the charges for cartage and warehouse rent, but no further interest of his own. No charge was made to the customers for insurance, nor were they informed of the existence of the policy. The plaintiff's warehouse was consumed by fire with all the goods in it. The defendants paid the value of the plaintiff's own goods, and the amount of his lien on his customer's goods; but refused to pay the value of the customer's interest in the value of the goods beyond the lien. *Held*, that the goods of the customers were in trust within the meaning of the policy; and that the plaintiff was entitled to recover the entire value. *Waters v. Monarch Assurance Co.* 49.

GROCERIES.

See POLICY, or p. 707.

GUNPOWDER.

See CAUSA PROXIMA, or p. 478; SPIRITUOUS LIQUORS, or p. 707; also pp. 461, 553, 744.

1. *On sale.* — To a valued policy of insurance against fire, on a "stock of goods and merchandise contained in" plaintiff's store, one of the conditions was that "the keeping of gunpowder for sale or on storage, upon or in the premises insured, shall render the policy void." *Held*, that the keeping of small quantities of gunpowder in kegs, as part of the stock of goods kept for sale, did not vitiate the policy. *Leggett v. Aetna Insurance Co.* 140.

2. Where three adjoining houses were insured in one policy, for a specified sum on each, and one of them, occupied as a shoe store, was afterwards, without the knowledge or consent of the insurers, changed into a grocery store, in which gunpowder was kept, and from an explosion of which all the houses were injured, the conditions annexed to the policy requiring groceries and gunpowder to be specified and

- pay a higher rate of premium : *Held*, that the contract was entire, and that there could be no recovery for the injury to any of the houses, although the owner did not know that the tenant kept gunpowder in the house. *Fire Association v. Williamson*, 154.
3. *Explosion of*. — A clause in the policy of fire insurance that the insurers should not be liable for a loss from an explosion of gunpowder, applies to the case of a fire originating from the explosion of gunpowder on the premises. *Greenwald v. Insurance Co.* 451.
 4. Where, to stop the spread of flames, a house already on fire is blown up with gunpowder, there being no means of extinguishing fire by water in the town, the insurers are liable. *Ib.*
 5. *Agent's knowledge*. — Where by a fire policy it was provided that the keeping of gunpowder "without written permission in the policy" should render the policy void, it was *held* that if the agent taking insurance on a stock of goods knew that gunpowder was kept and to be kept, the keeping it would not render the policy void, whether permission to keep it was indorsed or intended or neglected to be indorsed or not. *Peoria Insurance Co. v. Hall*, 737.
 6. Notice of this fact to the agent was notice to the principal, and by taking the premium and issuing the policy, the insurer must be regarded as having waived the condition which prohibited gunpowder being kept. *Ib.*

HAT BLEACHING.

See p. 106.

HAZARDOUS ARTICLES.

See p. 640.

HAZARDOUS TRADE.

See p. 480.

HOUSE OF ILL-FAME.

A policy of insurance upon a hotel, described in the application (which is expressly made a part of the policy and warranty on the part of the assured) as occupied as such by a tenant, and which is in fact leased and apparently used as a hotel at the time of obtaining the insurance, is not avoided by its being then used by the tenant, without the knowledge or consent of the assured, as a house of ill-fame. *Hall v. People's Insurance Co.* 71.

HUSBAND AND WIFE.

See pp. 287, 552.

INCREASE OF RISK.

See pp. 16, 28, 106, 408, 481, 758.

1. *Stoves*. — The setting up of seven stoves in the building containing the insured property *held* to authorize the jury to find an increase of risk. *Fabyan v. Union Insurance Co.* 108.
2. *Permanent increase*. — It was part of one of the conditions of the policy that, "if after insurance is effected the risk shall be increased by any means within the control of the assured, such insurance shall be void and of no effect." *Held*, that the increase of risk contemplated was by something permanent or habitual. *Leggett v. Aetna Insurance Co.* 140.
3. *The addition of a steam-engine, cupola-furnace, foundry, and blacksmith forge to a*

back building connected with that containing the press, *held* to be evidence of an increase of risk, such as was forbidden by the proviso. *Robinson v. Mercer Insurance Co.* 277.

4. If there is no stipulation in the policy against an increase of the risk, good faith requires the assured, if he exposes the property to a risk far more hazardous than could have been contemplated by the insurers, to notify them of the change, and a neglect to do so may be considered evidence of gross negligence, which will avoid the policy. *Ib.*
5. *The mere requirement of notice* of increase of risk without any penalty for failure need not be performed (the loss not having occurred by reason of the increase), though the provision state that upon such notice the company shall have the option to determine the contract; for it cannot be certainly assumed upon the trial that the contract would have been terminated. *Joyce v. Maine Insurance Co.* 317.
6. *Disclosure of new facts.*—If the by-laws of an insurance company are expressly made a part of the policy, and provide that if subsequent to the making of the application any new fact shall exist, by the change of any fact disclosed in the application, or the erection or alteration of any building, which increases the risk, or which it would have been necessary to state had it existed at the time when the application was made, the policy shall be void unless written notice is given to the directors and their written consent obtained; the insured is bound to the same degree of strictness in disclosing the existence of new facts whether material or not, as in disclosing the facts existing at the time of making the application. *Calvert v. Hamilton Insurance Co.* 538.

INCUMBRANCE.

See pp. 28, 150, 151, 409, 554, 580, 595, 640, 698, 706, 707, 716, 730.

Waiver.—When an applicant for insurance has answered a question in the application as to the existence and amount of incumbrances upon the property by saying that incumbrances exist, without stating their amount, the issuing of the policy is a waiver of any objection to the answer on the ground of insufficiency; and the whole amount of incumbrance is immaterial if the plaintiffs are in possession under a first mortgage, which is for a greater sum than the amount of the insurance. *Nichols v. Fayette Insurance Co.* 520.

INDEPENDENT CONTRACTS.

A policy on merchandise and another on the factory issued by the defendants to the plaintiff *held* independent contracts. *North Berwick Co. v. New England Insurance Co.* 790.

INSOLVENCY.

See ALIENATION, or p. 417.

INSURABLE INTEREST.

See pp. 24, 180, 241, 285, 287, 416, 552, 555, 737, 755, 776.

One who owns the soil is presumed to own the buildings thereon. And where the land-owner leased to another, at a nominal rent, with permission to erect a building, the leasee to surrender the premises in as good condition as they had been in before, with no reservation of a right to remove the building, *held*, that the land-owner had an insurable interest in the building, being the presumed owner. *New York v. Hamilton Insurance Co.* 675.

"INSURED."

See ASSIGNMENT, or p. 1; REINSURANCE, or p. 188.

INTENTION.

To violate terms of policy. See p. 483.

INTEREST.

See p. 646.

JUDGMENT.

See p. 737.

JURY.

See LAW AND FACT; also pp. 481, 513, 652.

LANDLORD AND TENANT.

See ALTERATIONS, or p. 7.

The insurance of a landlord who uses reasonable care and diligence in the selection of tenants and the management of the premises is not affected by his tenants keeping straw on the premises without his knowledge or assent, so as to increase the risk. *White v. Mutual Assurance Co.* 216.

LAW AND FACT.

See pp. 481, 513, 652.

1. In an action to recover for a loss by fire, which originated in an adjoining carpenter shop the location of which was properly given in the application for the insurance, it is not error to permit the jury to decide whether stoves are customary and necessary in a carpenter shop, coupled with instructions that if not necessary and customary the plaintiff cannot recover. *Girard Insurance Co. v. Stephenson*, 513.
2. Nor is it error in such a case for the court to permit the jury to decide whether the placing of a steam-engine in the shop, by which the stoves were superseded, had increased the hazard over what it would have been from the stoves alone, with the instruction that if it had done so, and the loss was the result of the change, the plaintiff must fail; but if not, the loss must fall upon the company, even though the fire may have originated from the engine. *Ib.*

LEASE.

Construction of. See p. 654.

LEVY ON PROPERTY.

See pp. 651, 653.

Wrongful. — A condition in a policy of insurance that it should cease from the time that the property insured should be "levied on or taken into possession or custody, under an execution or other proceeding at law or equity," does not apply to a wrongful levy made upon the property as that of another person. *Philadelphia Insurance Co. v. Mills*, 730.

LEX LOCI

See p. 3.

LIENS.

See MECHANICS' LIEN; also pp. 24, 388, 580.

A judgment against an insurer, which is limited in its effect, and does not extend to the insured property, is not a "lien" within the meaning of the interrogatory pro-

pounded to insurers relative to incumbrances, and will not avoid a policy of insurance which issued upon a negative answer by the party insured. *Somerset Insurance Co. v. McAnally*, 733.

LIMITATION CLAUSE.

See PRELIMINARY PROOFS, or p. 444; also pp. 105, 110, 144, 243, 299, 407, 410, 546, 555, 556, 585, 621, 755.

The limitation clause held invalid. See p. 230.

1. *Waiver.* — One of the conditions of a policy of insurance was that no action should be brought under it against the company, unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition; and relied upon an alleged conversation between his agent and the president of the company. *Held*, that the condition could not be so waived, and that such evidence was properly rejected. *Held*, also, that the letter set out below contained no evidence of a waiver of this condition. *Lampkin v. Western Assurance Co.* 18.
2. *Construction.* — The clause requiring suit to be brought within a certain time, and that requiring action to be postponed a certain time, must be read together. And therefore where the action was to be brought within six months after loss, and sixty days were to be allowed after adjusting the proofs, *held*, that if the adjustment took so long that the six months expired before the end of the sixty days still to be allowed, the six months' clause must give way to an action brought at the end of the sixty days. *New York v. Hamilton Insurance Co.* 675.
3. By one of the conditions attached to a fire policy, it was provided that no suit should be brought upon it unless within twelve months next after the loss; and in case any suit should be commenced after the expiration of twelve months, the lapse of time should be deemed and taken as conclusive evidence against the validity of the claim. It was *held* that if such a condition was valid at all, it was valid as a contract only, and that the limitation fixed by it must, upon the principles governing contracts, be more flexible in its nature than one fixed by statute, and liable to be defeated or extended by any act of the insurer which prevents action being brought within the prescribed period. *Held*, further, that the insured had the whole of the twelve months within which to commence suit, and that the limitation must rest upon the tacit condition, without which it could not be valid, that the insurer should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close to enable the insured to commence his suit in the ordinary legal mode. *Peoria Insurance Co. v. Hall*, 737.
4. And process having been issued before the expiration of the twelve months, returnable two days after their expiration, and no agent of the insurer — a foreign corporation — being found in the county, upon whom to make service, and new process being issued on the return of the first, it was *held* that the failure to commence suit within twelve months was sufficiently excused, and the second suit, under the circumstances, was brought in season. *Id.*

LOST POLICY.

See p. 180.

MATCHES.

See pp. 330, 555.

MATERIALITY.

See pp. 497, 646.

MECHANICS' LIEN.

An insurable interest. *Stout v. City Insurance Co.* 556.

Assignment of policy on. *Ib.*

MISDESCRIPTION.

See **FRAUD AND MISREPRESENTATION**; also p. 23.

MISREPRESENTATION.

See **FRAUD AND MISREPRESENTATION**.

MISTAKE.

See pp. 149, 295, 600; **AGENT**, or p. 161.

MORTGAGE.

See pp. 23, 106, 325, 408, 584, 723, 789.

Insurance of mortgage interest. See pp. 416, 761.

MUNICIPAL POWERS.

The common council of Detroit has power to pass ordinances establishing fire limits, and forbidding the rebuilding or repair of wood buildings within such limits. Such an ordinance is not to be regarded as a condemnation to the public use of such buildings as have become worthless unless repaired. Brady v. Northwestern Insurance Co. 663.

MUTUAL COMPANIES.

1. *Membership of company.*—The fifth section of the charter of the company provides, "that all policies, or contracts founded thereon, shall be subscribed by the president, and attested by the secretary, and the said company shall be liable for all loss or damage by fire or other casualty, agreeably to the terms thereof." The sixth section provides, "that every person who shall become a member by effecting insurance shall, before he receives his policy, deposit his promissory note for such a sum of money as shall be determined by the directors." The eighth section provides, that every member of said company shall be bound to pay for losses in proportion to the amount of his deposit note; and the company shall have a lien on the building insured to the amount of the note, when they shall file a memorandum with the clerk of the county. *Held*, that the deposit of the note is a condition precedent, without which no one can become a member; and no one can be insured, directly or indirectly, without becoming a member, or at least without placing himself in a situation so that he is entitled to be a member, and is prevented by fault of the company. *Belleville Insurance Co. v. Van Winkle*, 269.
2. The directors of a mutual insurance company, or their officers, by their direction or approval, may so act as to entitle a person to become a member who, by the fault of the officers of the company, has been prevented from depositing his note, and so as to authorize a court of equity to compel his being received. *Ib.*
3. All persons applying to become members of an incorporated insurance company must be presumed to have known the terms of its charter and by-laws. *Ib.*

NEGLIGENCE.

See pp. 23, 715.

Mere negligence on the part of a person insured, which is the direct cause of a loss by fire, is not a defence to an action upon the policy, if he acted in good faith,

and his negligence did not amount to recklessness and wilful misconduct. *Johnson v. Berkshire Insurance Co.* 637.

NON-DISCLOSURE.

See BILL OF REVIEW; FRAUD AND MISREPRESENTATION.

NOTICE OF LOSS.

See ARBITRATION, or p. 375; also pp. 3, 16, 313, 453, 481, 510, 565, 652.

1. "*Forthwith*." — A requisition in a policy of insurance that the assured shall *forthwith* give notice of a loss to the company is not complied with by giving notice at the expiration of twenty days. *Whitehurst v. North Carolina Insurance Co.* 482.
2. By a condition in the policy, the insured were bound, in case of loss by fire, to forthwith give notice to the secretary, and within thirty days after loss to deliver to the secretary a particular account of such loss or damage. An account was sent by mail to the secretary, setting out the names of the partners, the number of their policy and amount insured therein, the value of their stock in the store as estimated from their books, and reciting insurances in two companies (the store in front and its brick extension having been insured by another company), giving an account of an entire undivided loss, and claiming it to be embraced in the policies of the two companies, but without stating the amount of the loss or damage upon the policy of the insurance company defendant, nor that the loss was upon goods insured under that policy, nor in what way that loss was ascertained. *Held*, that the account sent was not such a particular account of the loss and damage as was required by the policy. *Lycoming Insurance Co. v. Updegraff*, 565.
3. Personal notice not necessary. *Herron v. Peoria Insurance Co.* 601.
4. *Waiver*. — A defect in the time of giving notice of loss stands on different ground from defect in the matter of the notice. The former *may* be waived, but it requires different evidence from what would be sufficient as to the latter. *Patrick v. Farmers' Insurance Co.* 621.
5. A vote of the company to indefinitely postpone the plaintiff's claim *held* not a waiver of the requirement of notice within a certain time. *Ib.*

NOTICE OF OTHER INSURANCE.

See OTHER INSURANCE.

OCCUPATION OF PREMISES.

See EXPERTS, or p. 317; also pp. 461, 474, 484, 553.

1. *Warranty*. — A mere statement of the occupation of a house by the insured is not a warranty that it shall continue so occupied. *Joyce v. Maine Insurance Co.* 317.
2. *Notice of vacancy*. — Where the provision of a policy of insurance was that "if any change be made as to the tenants or occupancy of the premises without being notified to the company and indorsed upon the policy, then this instrument to be void." *Held*, that if the persons who occupied the premises at the time of the execution of the policy left a short time before the fire, leaving them unoccupied at the time of the fire, it was not necessary that the assured should have given the company notice that the tenant had left, in order to hold the company liable. *McAnnally v. Somerset Insurance Co.* 518.
3. *Vacating house*. — A policy of insurance, issued upon a dwelling-house occupied by tenants, and containing a provision that "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this

company, and additional premium paid, "will become void if the building is vacated and the only notice given thereof is to an agent of the company whose authority is limited to take applications and countersign policies, to collect and receive cash for premiums, and to issue a 'binder' on special hazards for ten days," and no additional premium is paid; and it is immaterial that the insured did not know the extent of the agent's authority. *Harrison v. City Insurance Co.* 759.

OIL.

See p. 555.

OTHER INSURANCE.

See pp. 3, 25, 28, 111, 229, 269, 285, 315, 316, 379, 407, 408, 441, 453, 483, 553, 564, 585, 595, 652.

1. *Verbal consent.* — A policy issued by a mutual fire insurance company, whose by-laws provide that any insurance subsequently obtained without the consent in writing of their president shall avoid the policy, and that the by-laws shall in no case be altered except by a vote of two thirds of the stockholders or directors, is avoided by a subsequent insurance obtained with the mere verbal consent of the president. *Hale v. Mechanics' Insurance Co.* 59.
2. *If a policy provides* "that the aggregate amount insured in this and other companies shall not exceed two thirds of the estimated cash value," such insurance, in violation of the agreement, renders the policy void. *Lycoming Insurance Co. v. Stockbower*, 157.
3. *Notice.* — If the company has notice of the additional insurance, and elects not to avoid the policy, but treats it as in full force, it is a waiver of the right to resist a recovery upon that ground. *Ib.*
4. *Waiver.* — The implied waiver arising from such acts of the insurance company will not deprive it of the benefit of a stipulation that in the event of other insurances, only a proportionate part of the amount insured shall be demanded on the policy. *Ib.*
5. *Prior insurance.* — Upon the face of a policy were printed provisions that in case the assured already had other insurance on the property, not notified to the company and mentioned in the policy, this policy should be void; and that if subsequent insurance should be obtained, and not notified to the company and indorsed upon the policy, the policy should cease. *Held*, that a clause inserted in writing upon the face of the policy, in these words, "Other insurances permitted without notice until required," applied to prior as well as to subsequent insurances; and that a previous policy did not therefore avoid this one; but if it contained similar printed clauses, was itself made void by the obtaining of this one, without any vote or adjudication by the previous insurers that the property was over insured and an election by them to cancel their policy; although they by their policy reserved the right to cancel it in case of any subsequent insurance which, with theirs, should in their opinion amount to an over-insurance. *Kimball v. Howard Insurance Co.* 176.
6. A notice by the assured to the agent of an insurance company, of the assured's intention to procure subsequent insurance upon the same property, is not evidence of a compliance with a provision in the first policy requiring any subsequent insurance to be made known to the first insurers and indorsed upon the policy, or otherwise acknowledged in writing by them. *Ib.*
7. The question whether reasonable diligence has been used in communicating a subsequent insurance to the first insurers, when all the facts are agreed, is a question of law for the court. *Ib.*
8. Seven months is an unreasonable delay in giving notice of a subsequent insurance

- to previous insurers whose policy expressly required the assured to give such notice "with reasonable diligence." *Ib.*
9. A policy of insurance against fire, issued by a stock company, in consideration of an entire premium, for one sum upon a stock of goods, and for an additional sum upon the fixtures in the same shop, and stipulating that in case of any subsequent insurance "on the same property," without a certain notice and acknowledgment, "this policy shall cease, and be of no further effect," is wholly avoided by such a subsequent insurance on the goods only. *Ib.*
 10. *Burden of proof.* — In an action on a policy of insurance, in which the defence relied upon is a subsequent insurance contrary to the terms of the first policy, the burden of proving that the two policies covered the same property is upon the defendants. *Clark v. Hamilton Insurance Co.* 223.
 11. A policy of insurance upon "carpenter's shop and carpenter's tools" provided that the issuing of any other policy covering any portion of the property insured, and not disclosed to these insurers, should avoid this policy. *Held*, that evidence of the issuing of another policy to the same person upon "four chests of carpenters' tools in wood shop," described as situated in the same street as in the first policy, and that there were in the shop two chests of tools belonging to the assured, and two or perhaps three belonging to their journeymen, did not show that any part of the property was covered by both policies. *Ib.*
 12. *Mistake.* — A condition requiring notice of other insurance, *held* not broken by the plaintiff's stating, through mistake, in a notice of further insurance, that the whole was obtained in one company. *Benjamin v. Saratoga Insurance Co.* 261.
 13. *Construction.* — This clause in a policy of insurance against fire, "other insurances permitted without notice until required," applies to insurance already existing on the property, notwithstanding that the policy provides that "in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this company and mentioned in or indorsed upon this policy," the policy shall be void and of no effect. *Blake v. Exchange Insurance Co.* 306.
 14. The words "privilege for \$4,500 additional insurance" were written in the body of a policy of insurance. *Held*, to work a waiver of a subsequent printed condition in the policy requiring notice to be given to the insurers of any other insurance (within the sum specified), and to leave the same indorsed on the policy. *Benedict v. Ocean Insurance Co.* 462.
 15. The true intent and meaning is, that the insured may obtain further insurance without notice to the company, and without affecting their policy or their liability upon it, provided such additional insurance does not exceed \$4,500. *Ib.*
 16. The condition requiring notice of other insurance refers to all insurance not void upon the face of the policy. *Bigler v. New York Central Insurance Co.* 501.
 17. The fact that a third person, interested in the property, has previously obtained insurance in the name of the plaintiffs, but without their knowledge, will not avoid a policy, although the by-laws annexed thereto provide that if a previous policy exists and is not disclosed the policy shall be void. *Nichols v. Fayette Insurance Co.* 520.
 18. *Construction.* — The policy declared that "in case any other insurance has been or shall be issued covering the whole or any portion of the property insured," the contract shall be void without notice and consent. The insured removed the goods (ready-made clothing) covered by the policy in suit into another building containing other goods of the same kind, upon which he had obtained other insurance; the two lots of goods being consolidated after the removal. *Held*, that it was not necessary to give notice of this insurance. *Vose v. Hamilton Insurance Co.* 606.
 19. The mere fact that a party has failed to disclose the true nature of his interest in property insured by him by a policy which requires such disclosure cannot, in an

action upon another policy, be held to make the former void within a condition in the latter requiring notice of other insurance. *David v. Hartford Insurance Co.* 609.

20. *Assignment*.—In reply to the question whether there was any insurance on the property, the plaintiff said no. He had in fact previously obtained insurance with the same underwriter. *Held*, that the policy was not avoided, though the charter provided that other insurance should only subsist with the consent of the defendants signified by indorsement on the policy. And if under such circumstances the defendants consent to an assignment of the policy, the policy is binding in the hands of the assignee. *Barnes v. Union Insurance Co.* 716.

OVER-VALUATION.

See pp. 242, 378, 416, 484, 653.

Verdict for the plaintiff set aside on the ground of "fraud or false swearing," as to the valuation of the property; the plaintiff claiming a loss of \$2,400, and the jury assessing his damages at \$1,060, on a policy for \$2,000. *Wall v. Howard Insurance Co.* 648.

OWNERSHIP.

See FRAUD AND MISREPRESENTATION; also p. 510.

PARTIAL LOSS.

See p. 546.

PARTIES.

See pp. 28, 95, 107, 252, 733, 755.

1. *Mortgagee*.—An action cannot be maintained by a mortgagee, to whom a policy is made payable, if he be not named as the party insured, upon a breach of the terms of the policy by the party so named. *Grosvenor v. Atlantic Insurance Co.* 254.
2. *Insurance of firm*.—*Death of partner*.—If an insurance be effected by A and B as partners, upon the partnership property, A cannot maintain an action on the policy in his own name upon proof of the death of B. But *secus*, if the company subsequently promise, expressly or by implication, to pay it. *Wood v. Rutland Insurance Co.* 333.
3. *Action*.—An action may be brought in the name of the assignor of a policy (assigned with consent of the underwriter) for the benefit of the assignee, though the former have no interest in the property; and this, too, though a renewal receipt has been executed to the assignee. *New England Insurance Co. v. Wetmore*, 656.
4. Suit may be brought in the name of an agent who has effected the insurance in his own name. *Barnes v. Union Insurance Co.* 716.

PARTNERS.

See ALIENATION, or p. 380; also p. 653.

Insurance by one in his own name, 213.

Retirement of. See p. 330.

1. *What policy covers*.—If one partner insure the partnership property against loss by fire in his own name only, and it does not appear that the insurance was really intended for the benefit of the firm, the premium paid from the partnership funds, and the transaction subsequently ratified by the other partner, the policy will cover only the undivided interest of the partner insuring. *Peoria Insurance Co. v. Hall*, 737.
2. It makes no difference in this respect that the agent of the insurer knew the interest of the parties, and that it was the intention of both the insurer and insured, at the time of issuing the policy, that the insurance should cover the whole. *Id.*

3. The rule may be otherwise where the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien on the goods insured. *Ib.*
4. Where a policy when made covers the interest of one partner only, the remaining interest cannot be brought within it by the partner insured subsequently becoming the owner of the whole. *Ib.*

PAYMENTS EX GRATIA.

See p. 744.

PLACE OF SUIT

A provision of a by-law of a mutual fire insurance company, to which their policies are expressed to be subject, that any suit on a policy shall be brought in the county where the company is established, is not binding on the assured. *Nute v. Hamilton Insurance Co.* 63; *Hall v. People's Insurance Co.* 71; *Amesbury v. Bowditch Insurance Co.* 110; *Bartlett v. Union Insurance Co.* 444.

PLEADING.

See pp. 17, 315, 331, 407, 653, 707, 715, 716, 758.

1. Covenant a proper remedy upon a renewal of insurance. *Herron v. Peoria Insurance Co.* 601.
2. The insured need not set out the application in declaring upon his policy. *Ib.*
3. In an action against an insurer, the defendant, not being presumed to know what prohibited articles were kept by the plaintiff when the loss occurred, is not bound to specify them in his pleadings. But where he specifies some, without alleging that any others were kept, the jury should not be permitted to consider any except those specified. *Phoenix Insurance Co. v. Lawrence*, 628.
Variance. See p. 647.

POLICY.

What it covers. See PARTNERS, or p. 737; also pp. 23, 25, 35, 161, 187, 268, 416.

1. A policy to a railroad corporation "on their road furniture, consisting of locomotive engines, cars of all descriptions, and snow-ploughs, on the line of their road, and in actual use, but not in machine or repair shops," covers cars left in the ordinary course of the business of the corporation upon an iron track connected with the railroad, though not owned nor controlled by the corporation. *Fitchburg Railroad Co. v. Charlestown Insurance Co.* 144.
2. Under a policy on a corndealer's and seedsman's "stock in trade, consisting of corn, seed, hay, straw, fixtures, and utensils in business," the value of hops and matting cannot be recovered, although these articles form an ordinary part of the stock in trade of such a business. *Joel v. Harvey*, 185.
3. *If upon a general survey of the provisions of the policy* and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is, that the party named as the assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person. *Duncan v. Sun Insurance Co.* 191.
4. *Verbal contract.* — The declaration stated that defendants, in consideration of £28 paid to them as the premium of insurance of £1,500 on certain property described in the plaintiff's application, promised to insure him against loss by fire to the amount of £1,500 until notified to the contrary, subject to the conditions of the policy, — that is, the policy usually issued by defendants in like cases; that the

- property was destroyed by fire, and although the plaintiff had done all things necessary on his part, yet defendants had not paid him the sum insured. *Held* bad, the action for non-payment of the money not being maintainable without a policy under defendants' corporate seal. *Jones v. Provincial Insurance Co.* 252.
5. A policy for a long period upon goods in a retail shop applies to the goods successively in the shop from time to time. *Hooper v. Hudson River Insurance Co.* 266.
Issuance of, 315.
 6. A policy of insurance on goods in "the brick building situated on Main Street, in C., known as D. & Co.'s Car Factory," covers goods in a building erected as a wing against the rear wall of D. & Co.'s car factory on Main Street, with an opening through the wall of less than three feet square, usually closed by an iron door, if both wing and main building are used for manufacturing cars and known as "D. & Co.'s car factory." *Blake v. Exchange Insurance Co.* 307.
 7. *Combustible materials.* — A policy of insurance on "stock in trade, being mostly chamber furniture in sets and other articles usually kept by furniture dealers," based on an application, which is made part of the contract, for insurance on "household furniture, being my stock in trade, mostly chamber furniture in sets," covers paints and varnish used to finish the furniture, if usually kept by furniture dealers; even if the by-laws to which the policy is made subject provide that the application shall be approved by two directors; and is not avoided by having on the premises as much varnish as is usually kept by furniture dealers, although it is an inflammable substance, and the insured, in answer to a question in the application, whether any explosive or highly inflammable matter was kept near or in the premises, answered, "Not to my knowledge." *Haley v. Dorchester Insurance Co.* 348.
 8. *Hazardous articles.* — A policy of insurance on a "stock in trade, consisting of the usual variety of a country store, except dry goods," with "permission to keep and sell burning fluid and gunpowder;" founded on an application which is made a part thereof, which states the property to be "the stock in trade, consisting of groceries, provisions, and such goods as are usually kept in a country store, except dry goods;" and declaring that if certain articles denominated hazardous, extra hazardous, and risks prohibited, enumerated therein, are kept in any premises insured, the policy shall be void, unless therein otherwise specially provided for; is not avoided by the keeping of some of these articles, if they are articles usually kept for sale in a "country store;" and parol evidence is admissible to prove this. *Whitmarsh v. Conway Insurance Co.* 485.
 9. *Store fixtures.* — Evidence is admissible of a well settled custom by which the words "store fixtures" in a policy of insurance are applied to all furniture and other articles in a shop or warehouse, necessary or convenient for use in the course of trade. *Ib.*
Divisible. See p. 758.
Renewal of. See p. 766.
 10. *What it covers.* — A policy of insurance against fire covers all loss which necessarily follows from the occurrence of a fire, whenever the injury arises directly or immediately from the peril, or necessarily from incidental and surrounding circumstances the operation and influence of which could not be avoided. *Brady v. Northwestern Insurance Co.* 663.
 11. A policy of insurance against fire provided that the policy should be void if the premises were used for storing or keeping therein any articles included in certain classes of hazards annexed to the policy, "except as herein specially provided, or hereafter agreed to by [the insurers] in writing upon this policy." It was held that where a stock was insured under the general designation of "groceries," which included some of these hazardous articles, the insurance by this designation did

specially provide for them "in writing upon the policy." *Niagara Insurance Co. v. De Graff*, 707.

12. *Removal*. — A policy of insurance upon goods "contained in the third story of a four-story building," over two specified numbers of a certain street, will cover such goods after their removal into another room subsequently hired and occupied by the insured in the same story of the same building; although the policy provides that it shall be void if the property insured shall be removed without necessity to any other place. *West v. Old Colony Insurance Co.* 761.

POWERS OF OFFICERS.

See *AGENT*; also pp. 387, 525, 732, 766.

PRACTICE.

See *ACTION*; *PARTIES*; *PLEADING*; also pp. 23, 31, 285, 295, 410, 416, 552.

PRELIMINARY PROOFS.

See pp. 161, 187, 213, 253, 268, 295, 388, 408, 417, 546, 553, 554, 564, 580, 584, 766, 776.

1. *Waiver*. — If after the preliminary proofs of a loss by fire under a policy of insurance, the officers of an insurance company visit the premises and converse with the insured and make no reference to the preliminary proofs, or raise any objection to them, while any defect therein may be remedied, and refuse to pay on other and distinct grounds, the insurance company will be estopped to set up any defect in the preliminary proof, although the conditions made part of the policy give explicit directions about proofs of loss, and the policy provides that no condition, stipulation, covenant, or clause in the policy shall be altered, annulled, or waived, except by writing indorsed on or annexed to the policy, and signed by the president or secretary. *Blake v. Exchange Insurance Co.* 307.
2. *Statement of interest*. — On a policy of insurance against fire, providing that the loss shall be paid within sixty days after notice and proof thereof according to the conditions annexed to the policy, which require such proof to include a statement of the interest of the assured in the property, the assured, if he omits to insert such a statement in his proof of loss, cannot maintain an action, unless the omission is waived by the officers of the company. *Shawmut Sugar Refining Co. v. People's Insurance Co.* 357.
3. Objections to the proofs of loss cannot be first made at the trial. *Bartlett v. Union Insurance Co.* 444.
4. *Limitation clause*. — The by-laws of a company provided, that upon notice of loss the company should proceed to ascertain the amount thereof, and settle the same within three months; and if the assured was dissatisfied he might sue within three months thereafter, but not later; and he must sue in the county of M. Held, that this provision did not apply to cases in which the company neglected altogether to proceed to the determination of the loss. *Ib.*
5. Not evidence of the amount of loss. *Newmark v. Liverpool Insurance Co.* 464.
Statement of value of property. See p. 489.
6. *By-laws*. — If an application for insurance contains an agreement that the assured will be "bound by the act of incorporation and by-laws of the company," and the policy issuing thereon recites that the company will be liable "according to the true intent and meaning of said act of incorporation and by-laws," and refers to the application as binding upon the assured, under the limitations and conditions expressed in the by-laws, the assured must comply with the conditions of the by-laws relative to giving notice and making proof of loss; and if the by-laws provide that every one sustaining loss "within thirty days shall file with the secretary a

- particular account of the amount," &c., the omission to do so for seventeen months will discharge the policy. *Smith v. Hamilton Insurance Co.* 528.
7. An omission to give notice and make proof of loss, in compliance with the requirements of the by-laws of a mutual insurance company, is not waived by a statement of the president of the company, made seventeen months after the loss, that the company would be disposed to do what was right, that they knew at the time of the fire that it was their loss, and were surprised that they were not notified; or by a subsequent direction from the directors of the company to one of the assignees in insolvency of the assured, in reply to a verbal claim of loss made by him, to have a statement of loss sent to them, and they would take the subject into consideration; or by a subsequent vote of the directors to require the assured to make a statement under oath in regard to the loss. *Ib.*
 8. *Knowledge by an agent* of a mutual insurance company of a fire by which a loss occurred does not relieve the assured from the duty of giving notice and making proof of loss, according to the by-laws. *Ib.*
 9. Objections to the preliminary proofs are not waived by mere silence on the part of the company. *Keenan v. Missouri Insurance Co.* 547.
Waiver of. See p. 793.
 10. *The non-production of part of the preliminary proofs is waived by a failure to make objection at the time the proofs are sent in.* *Deusen v. Charter Oak Insurance Co.* 694.
 11. *Waiver.*—A defect in the certificate of loss held not waived by a general objection to the document. *Cornell v. Milwaukee Insurance Co.* 755.

PREMIUM.

Payment of. See p. 584.

PRESIDENT'S AUTHORITY.

See AGENT, or p. 525.

PRINTING ESTABLISHMENT.

See CAMPBELL, or p. 247; USE OF PREMISES, or p. 277.

PROMISSORY REPRESENTATION.

See REPRESENTATION, or p. 510.

PROMISSORY WARRANTY.

See WARRANTY, or p. 556.

PROOF OF LOSS.

See PRELIMINARY PROOFS.

RAGS.

See USE OF PREMISES, or p. 146.

REASONABLE TIME.

See pp. 31, 269, 461.

REBUILDING.

See REPAIRS; also pp. 512, 698.

1. *Impossibility of.*—Defendants executed a policy insuring plaintiff's premises against fire; reserving to themselves "the right of reinstatement in preference to the payment of claims." The premises were damaged by fire, and defendants

- elected to reinstate them, but did not do so. To an action for not paying, compensating, or reinstating, defendants pleaded that they elected to reinstate, and were proceeding to do so when the commissioners of sewers, under the Metropolitan Building Act, 1855, caused the premises to be taken down, as being a structure in a dangerous condition; and that such dangerous condition was not caused by the damage from the fire. On demurrer, held by Lord Campbell, C. J., Crompton, J., and Hill, J., dissentiente Erie, J., that the plea was bad, inasmuch as the contract to reinstate (which became the one contract under the policy, after election made) being lawful, at and ever since the time of contracting, the impossibility of its performance was no defence, and the defendants were bound, if they could not perform it, to pay damages for not doing so. *Brown v. Royal Insurance Co.* 371.
2. *The right to rebuild* given an insurance company by the policy is a condition subsequent, and the insured in declaring on the policy need not negative the performance of it. *Ætna Insurance Co. v. Philps*, 581.
3. *Form of action.* — A building was insured against fire to the amount of \$3,000 by A, and to the amount of \$2,000 by B, in separate policies, each of which contained the following clause: "In case of loss or damage to the property insured, it shall be optional with the company to replace the article lost or damaged with others of the same kind or quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within twenty days after having received the preliminary proofs of loss," &c. The building having been destroyed by fire A and B served a joint notice upon the insured, that they were prepared to rebuild, and requested plans and specifications, which were furnished accordingly. The building having been reconstructed, the insured insisted that the contract to rebuild had not been substantially complied with, and brought an action on the policy against A, claiming to recover the whole amount of his original loss. Held, that he could not recover. *Morrell v. Irving Insurance Co.* 766.
4. After the election and notice, a contract to rebuild existed between the parties, of such a kind that the contractor had received the entire consideration in advance. If this contract is not fulfilled by the insurer, he is liable for the damages sustained by the non-fulfilment of the contract, which may be more or less than the amount insured. The action, consequently, should have been brought to recover damages for a breach of contract. *Ib.*
5. *It seems* that the action might have been brought against both insurers jointly or either separately. *Ib.*

RECEIPT.

See pp. 17, 29, 105, 656.

Construction of. See p. 341.

Renewal. See p. 428.

RECEIVER.

A receiver of an insurance company, appointed by this court, has no power to waive the rules of law in allowing claims offered for proof against the company. *Evans v. Trimountain Insurance Co.* 764.

REFORM OF POLICY.

See p. 285.

Fire heat. — Where the premises insured were described as a warehouse, and were subsequently used as a candy manufactory, in which fire heat was necessarily employed, and the policy was issued by a mutual insurance company, whose deed of settlement contained a provision, "that no policy shall be so construed as to extend to any house or shop where any trade or business is carried on that requires the use of fire heat, unless the same be mentioned in the policy, and a proportionable deposit paid, to be agreed upon with the directors," and by the act of incorporation

the insured becomes a member of the company, subject to all the restrictions of the deed of settlement. Parol proof that, at the time the insurance was effected, the insured notified the officers and agents of the company of the intended use of the premises, who knew that fire heat would necessarily be used in the manufactory, is not sufficient proof of an agreement for an insurance to cover that contingency, to entitle the insured to a reformation of the policy so as to cover the loss, the premium actually charged and paid being that proportioned only to the ordinary risks upon a warehouse. *Elatner v. Cincinnati Equitable Insurance Co.* 204.

REINSURANCE.

1. "Assured." — By the terms of the contract in controversy the defendants "reinsured the American Ins. Co. of A., upon the following policies issued by them" (a detailed statement of which policies is embodied in the contract), "loss, if any, payable to the assured upon the same terms and conditions as contained in the original policies." *Held*, that the word "assured" meant the party reinsured, and not the party originally effecting insurance. *Carrington v. Commercial Insurance Co.* 188.
2. *Insolvency*. — In case of reinsurance, the reinsured can collect of the reinsurer before payment to the original party insured. Nor does the insolvency of the company reinsured discharge the reinsurer. *Eagle Insurance Co. v. Lafayette Insurance Co.* 230.
3. Reinsurers may make any defence that the insurer could. *Id.*

REMOVALS.

See POLICY, or p. 761 ; also p. 640.

1. *Reasonable time*. — Where an applicant for insurance, in reply to an interrogatory respecting the situation of the building containing the property to be insured, described two small buildings, and added to the description, "both the above buildings are to be moved fifteen feet," and a loss occurred before these buildings had been removed : *Held*, that the insured were entitled to a reasonable time to make these removals, and that the jury were rightly instructed to inquire what, under the circumstances of the case, was a reasonable time. *Lindsey v. Union Insurance Co.* 25.
2. *Construction*. — A policy of insurance effected with the Lancashire Insurance Company had indorsed on it a condition, "that persons changing their habitations or warehouses might preserve the benefit of their policies, if the nature and circumstances of such policy were not altered; but such insurance would be of no force till such removal or alteration were allowed at the office by indorsement on the policy." McC. & Co., of Belfast, whilst removing goods insured in stores in Victoria Street, to stores situate in Corporation Street, had such removal allowed at the office of the insurance company as appeared by an indorsement to that effect on the policy. Before such removal had been completed, a fire broke out in the stores in Victoria Street, which consumed a large quantity of the goods in question. McC. & Co. brought an action on the policy to recover damages for the loss of their goods in Victoria Street. *Held*, that such action was not maintainable. *McClure v. Lancashire Insurance Co.* 488.

RENEWAL OF POLICY.

See pp. 316, 379, 428, 766.

1. *Each renewal of a policy of insurance is a new contract*, and is subject to the local laws in force at the time of the renewal. So *held*, where a policy of insurance of a wood building against fire was made in 1856, and renewed from year to year until 1861, and between its date and the last renewal city ordinances had been adopted, prohibiting the reconstruction or repair of wood buildings within certain limits, including the building insured. *Brady v. Northwestern Insurance Co.* 663.

2. *Increase of risk. — Notice. — Waiver.* — Although an insurance policy contains a condition that insurances are deemed made on the representations of the applicant, and renewals shall be deemed made under the original representation in so far as it might not be varied by a new one in writing which the insured should make in all cases where the risk had been changed; and that if before a renewal the risk had been increased, and the insured failed to give information thereof, the renewal should be void; yet if no written representations were made by the applicant when the policy was issued, but the company took the risk on the report of their surveyor, oral information of an increase in the risk is sufficient if it is received and a renewal is granted thereon. And the act of issuing a renewal without objecting to oral notice is a waiver of the requirement of written notice. *Liddle v. Market Fire Insurance Co.* 747.

REPAIRS.

See REBUILDING; also pp. 31, 299.

1. *Measure of damages.* — Under a policy of insurance on a building against fire, which provides that the insurers may "make good the damage by repairs, and the insured shall contribute one fourth of the expense," if the insurers, intending to comply with this provision in good faith, make repairs of substantial benefit, though not fully making good the loss, the measure of the assured damages is the difference between the value of the building as repaired, and what it would have been if fully repaired; deducting one fourth of their value to the estate. *Parker v. Eagle Insurance Co.* 226.
2. The failure of the insured to repair a defect in the property, arising after the contract was made, unless he be guilty of gross neglect, does not work a forfeiture of the plaintiff's right to recover on the policy. *Whitehurst v. Fayetteville Insurance Co.* 403.
3. *Construction.* — Where an insurance policy provided that any alterations or repairs made in or about the insured property must be at the risk of the party insured, it was held that alterations or repairs did not *per se* avoid the contract, but only that the insured party should assume the hazard of their increasing the liability of the insurer. *Girard Insurance Co. v. Stephenson*, 513.
4. *Waiver.* — Notice of intention to repair is a waiver of a defence of false representations, in the absence of fraud or mistake. *Bersche v. Globe Insurance Co.* 590.

REPRESENTATION.

See FRAUD AND MISREPRESENTATION, or p. 606.

Promissory representation. — A statement in an application (not directly responsive to any question) that the premises "will be occupied by a tenant" need not be fulfilled, even if a warranty, unless there is an increase of risk by the failure. *Herick v. Union Insurance Co.* 510.

SALVAGE.

See p. 546.

SPIRITUOUS LIQUORS.

See p. 707.

1. *Spirituous liquors illegally kept for sale* may, notwithstanding, be lawfully insured against destruction by fire. The risks insured against are not the consequences of illegal acts, but of accidents. *Niagara Fire Insurance Co. v. De Graff*, 707.
2. Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituous liquors constituted a part of the stock, it was held that whether they were included in the term "groceries" in the policy was a question of fact for the jury. *Ib.*

3. A clause in a fire policy which provided that if gunpowder or other articles subject to legal restriction should be kept in greater quantities or in a different manner than was provided by law, the policy should be void, was *held* to have reference only to articles of an intrinsically dangerous nature as liable to cause injury accidentally or by carelessness, and not to refer to liquors, the traffic in which was made illegal by statute. *Ib.*

STATEMENT OF LOSS.

See pp. 651, 652, 732.

STATUTE OF FRAUDS.

See **VERBAL INSURANCE**, or p. 394.

STEAM-ENGINES.

See **ALTERATIONS**, or p. 365; **CONSTRUCTION OF CONTRACT**, or p. 300; **INCREASE OF RISK**, or p. 277; **LAW AND FACT**, or p. 513; also p. 77.

STOLEN GOODS.

See **THEFT**.

STORING.

If, by the terms of a policy of insurance, the keeping or storing of certain articles on the insured premises is prohibited during its continuance, and the policy only suspended whilst they are so used, the policy is not thereby rendered void. *Phoenix Insurance Co. v. Lawrence*, 628.

STOVES.

See **LAW AND FACT**, or pp. 513, 730.

SUBROGATION.

See pp. 180, 325, 761.

The mortgagee of premises insured by him as agent of a company (the application stating the existence of the mortgage) foreclosed the mortgage and became the purchaser at the sale. He then entered into a contract to sell the premises to B., and informed the defendants. They consented thereto, and agreed that the policy should remain valid until the title of B. should be perfected. Afterwards, assessments were made on the plaintiff's premium note and paid. Held, that the effect of this consent was to create a new contract of insurance upon which the plaintiff was entitled to sue. Nor were the defendants entitled to be subrogated to the plaintiff's rights against the vendee. Benjamin v. Saratoga Insurance Co. 261.

SUBSEQUENT INSURANCE.

See **OTHER INSURANCE**.

SULPHUR.

See p. 555.

SURVEYOR.

See p. 481.

SUSPENSION OF RISK.

See p. 107.

THEFT.

See pp. 204, 455, 464.

1. Losses arising from *bona fide* efforts to extinguish fire, such as wetting and soiling of goods and losses by theft, consequent on their removal, are fairly within the contract to insure against fire. *Whitehurst v. Fayetteville Insurance Co.* 403.
2. When the policy compels the assured to labor for the protection of the goods, and they are injured or stolen in the attempt to avoid the fire, the insurer is liable. *Talamon v. Home Insurance Co.* 587.

TITLE.

See FRAUD AND MISREPRESENTATION; also pp. 316, 334.

Misrepresentation of. See p. 510.

TITLE TO INSURANCE MONEY.

See p. 595.

TRUST.

See GOODS IN TRUST.

ULTRA VIRES.

See pp. 387, 744.

UNANSWERED QUESTION.

See p. 481.

In an application for insurance, which provided that questions not answered should be construed most favorably to the risk, the applicant left unanswered a question whether there was any livery stable in the vicinity. In an action on the policy of which this application was made part, the jury were instructed that if there was a livery stable in the vicinity at the time of the application, they were to determine what was the meaning of the question and of the word "vicinity;" and whether there was a livery stable in that vicinity, having reference to the situation of the building in which the property insured was situated, the situation of other buildings, and the locality, as ascertained from the contract and evidence. *Held*, that the defendants had no ground of exception. *Haley v. Dorchester Insurance Co.* 348.

UNTENANTED HOUSE.

See OCCUPATION OF PREMISES; also p. 584.

USE OF PREMISES.

See pp. 331, 484.

1. *Oil.* — Amongst the stipulations of the policy was one, that in case the above mentioned building shall at any time be "appropriated, applied, or used for the purpose of storing or vending therein" certain enumerated articles, "then, so long as the same shall be appropriated, applied, or used, these presents shall cease and be of no force and effect." *Held*, that plaintiff was entitled to recover for a loss by fire of the goods and merchandise insured, although it appeared that a barrel of oil had been temporarily left in a back room of the store, and that near it were some bunches of cotton yarn. *Leggett v. Aetna Insurance Co.* 140.
2. *Rags.* — Under a policy of insurance against fire on a stock in trade, described in the application (which is made a part of the policy) as consisting of "dry goods,

groceries, hardware, crockery, glass, and wooden ware, Britannia and tin ware, stoves of various kinds, and various other wares and merchandise," which provides that a use of the premises for the purpose of keeping or storing any of the articles denominated hazardous in the conditions annexed to the policy, "which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for," shall avoid the policy, unless otherwise specially provided for, and in which conditions "groceries with any hazardous articles," "rags," and several of the articles mentioned in the application are enumerated as hazardous, is avoided by the keeping of rags as a part of the stock; although it is usual for shopkeepers, having a general stock of goods like that insured, to keep rags in the same manner. *Macomber v. Howard Insurance Co.* 146.

3. A policy of insurance on the machinery in a silk factory, which provides that it shall be of no effect while the premises shall be used for storing "cotton in bales," "rags," or "wool," or for a "cotton mill," "woollen mill," or other "manufacturing establishment or trade requiring the use of heat," is not avoided by using one room for weaving a few pieces of stuff from woollen and linen thread and cotton, spun elsewhere and kept in the room. *Vogel v. People's Insurance Co.* 213.
4. *What policy covers.*—A policy of insurance on a "dwelling-house and wood-house," described in the application as "occupied for the usual purposes," covers a building, built at one time, with a single frame and roof, and designed for one building, for a carriage-house and wood-house, of which the wood-room constitutes two thirds, and is separated from the carriage-room by a loose partition extending to the eaves on one side, and halfway to the roof on the other; and does not exclude evidence that the whole building was called by the tenants and neighbors the "wood-house." *White v. Mutual Assurance Co.* 216.
5. *Printing press.*—A proviso in a policy of insurance, that if the premises above mentioned shall, at any time when such fire shall happen, be in whole or in part occupied for purposes considered hazardous, unless liberty so to occupy them be expressly stipulated for, this policy shall be void. *Held*, to apply to a building in which a printing-press that was insured was contained, and to that into which it was subsequently removed by consent of the insurers. *Robinson v. Mercer Insurance Co.* 277.
6. An application for insurance on a stock of goods represented that it was "all of goods usually kept in a country store," and that there was no "cotton or woollen waste, or rags, kept in or near the property to be insured." The by-laws, to which the insurance was expressly made subject, provided that no building in which cotton or woollen waste or oily rags were allowed to remain at night should be insured; and that all cotton, woollen, hempen, or oily waste or rags should be destroyed or removed every evening. *Held*, that the keeping of clean white cotton rags, if usually forming part of the stock of "a country store," did not avoid the policy. *Elliott v. Hamilton Insurance Co.* 388.

Breach of contract, as to. See p. 45.

VACATING PREMISES.

SEE OCCUPATION OF PREMISES

VALUATION.

SEE OVER-VALUATION; also p. 23.

A valued policy of insurance is not one which estimates merely the value of the property insured, but which values the loss, and is equivalent to an assessment of damages in the event of a loss. *Lycoming Insurance Co. v. Mitchell*, 794.

VALUED POLICY.

When a policy recites that the amount insured is not more than three fourths of the value of the property, "as appears by the proposal of the insured," and the application of the insured contains a valuation of the property, the policy is a valued policy. *Nichols v. Fayette Insurance Co.* 520.

VENDOR'S LIEN.

See p. 24.

VERBAL INSURANCE.

See p. 410.

1. The declaration alleged an agreement to renew a policy of insurance from year to year in consideration of an annual premium. *Held*, that such agreement need not be in writing. *First Baptist Church v. Brooklyn Fire Insurance Co.* 394.
2. A verbal contract to insure at common law is valid; and *held* that there was nothing in the defendants' charter forbidding such contracts; the tenth section of the charter (which was principally relied on) merely declaring that the contracts of the corporation, without the corporate seal, if signed by the president and countersigned by the secretary, should be binding. Nor was it otherwise by reason of the fact that in the body of the policy it was declared that the insurance might be continued for such further time as should be agreed upon "provided the premium therefor was paid and indorsed on the policy, or a receipt given for the same." *Ib.*

WAIVER.

See CERTIFICATE OF MAGISTRATE, or p. 601; EVIDENCE, or p. 420; ASSESSMENT, or p. 619; NOTICE OF LOSS, or p. 621; OTHER INSURANCE, or p. 462; also pp. 3, 18, 29, 37, 71, 111, 149, 187, 243, 295, 388, 407, 564, 580, 584, 595, 639, 640, 646, 651, 652, 656, 693, 699, 707, 732, 737, 776, 793.

Where the president of the insurance company defendant, when examining the books of the plaintiffs to ascertain the loss of goods in the store, was applied to by them for instruction how to make out their statement, and gave a memorandum in pencil, without date or signature, of what it should contain, neither the examination of the books nor the memorandum were evidence that the requirements of the policy in relation to a particular account of the loss had been waived by the company; the memorandum given to plaintiffs by which to make out their statement was, in effect, a demand of compliance with the terms of the policy; and it was error in the court below to instruct the jury that the giving of the memorandum was such an act as would waive the requirements of the policy, or that there was any evidence of a waiver whatever. *Lycoming Insurance Co. v. Updegraff*, 565.

WARRANTY.

See pp. 229, 393, 496, 563, 606, 647.

1. *Jury*. — Where to an application for insurance upon personal property was appended this clause: "And the said applicant covenants and agrees with said company, that the foregoing is a correct description of the property requested to be insured, as far as regards the risks and value of the sums." *Held*, that the answers to the interrogatories were simply warranties that the description of the property was correct so far as regarded the risks and value; and that the materiality of the facts to which the interrogatories related was a proper subject of inquiry by the jury. *Lindsey v. Union Insurance Co.* 25.

2. A statement in the policy that "water tanks [are] to be well supplied with water at all times," is complied with by the work on the tanks appearing to be well advanced when the risk was proposed, and their construction continued with reasonable diligence afterwards. *Gloucester Manuf. Co. v. Howard Insurance Co.* 32.
Promissory. See p. 99.
3. If it be doubtful from the words of a policy whether certain statements made by the insured, relative to the subject of insurance, are to be regarded as warranties or representations, they will be regarded as representations merely. *Wilson v. Conway Insurance Co.* 114.
4. Where the written application for a policy of fire insurance contained amongst others the following questions and answers: "19. Are the works operated on account of the proprietors or are they rented? Ans. By the proprietor. 20. Are they immediately superintended by one of the proprietors? If not, by whom? Ans. Yes." Which answers were both untrue; it was held, that evidence was inadmissible to show that these misstatements were, under the circumstances, immaterial to the risk; since, whether they were to be regarded as warranted or not, they were, being asked and answered, made by the parties material as representations, and so their truth made a condition of the policy, whether they were in fact material or not. *Ib.*
5. *Construction.* — The words "clerk sleeps in the store," in an application for insurance, copied into the policy, are mere description of occupancy, and not a warranty for the future. *Frisbie v. Fayette Insurance Co.* 159.
6. Whether a statement in a policy shall be taken as a warranty is a question of interpretation, to be ascertained as in other contracts. *Ib.*
7. The rule seems to be, that such representations in a policy are construed to be warranties, when it is apparent that they had in themselves or in the view of the parties a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them. If the court cannot say so, then they are treated as representations, and left to the jury. *Ib.*
Breach of. See p. 331.
8. The policy recited that the building was "occupied for stores below, the upper portion to remain unoccupied during the continuance of the policy." Held, that the former part of the statement was an affirmative and the latter part a promissory warranty. *Stout v. City Insurance Co.* 556.
9. *Construction.* — A policy insured "the five-story brick building and three-story brick addition known as the Lawrence Block, occupied as stores on the first floor, the upper portion intended for a hotel, and to be unoccupied during the continuance of this policy." Held, not a warranty that all the rooms on the first floor were occupied. It was enough if any of the rooms were occupied. *Carter v. Humboldt Insurance Co.* 786.
10. *Warranty.* — A warranty in a policy is a contract as to an existing fact, and not a covenant for future acts, and differs from a representation in that it is a binding agreement that the fact is as warranted; while a representation is not an agreement that the fact stated is so, but only such a statement of it as will constitute a misrepresentation if it be untrue. Where a policy of insurance fixes the value of the property insured, and contains a condition not to insure more than two thirds of this value, it is an undertaking on the part of the insured, which, if broken, will prevent a recovery on the policy unless the company were informed of the over-insurance, and waived the forfeiture. *Lycoming Insurance Co. v. Mitchell*, 794.

WATCHES.

See p. 35.

WATCHMAN.

See FRAUD AND MISREPRESENTATION, OF p. 243.

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